TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 523.

GEORGE W. ALLEN, ADMINISTRATOR OF THE ESTATE OF JOHN J. PHILBRICK, DECEASED, PLAINTIFF IN ERROR,

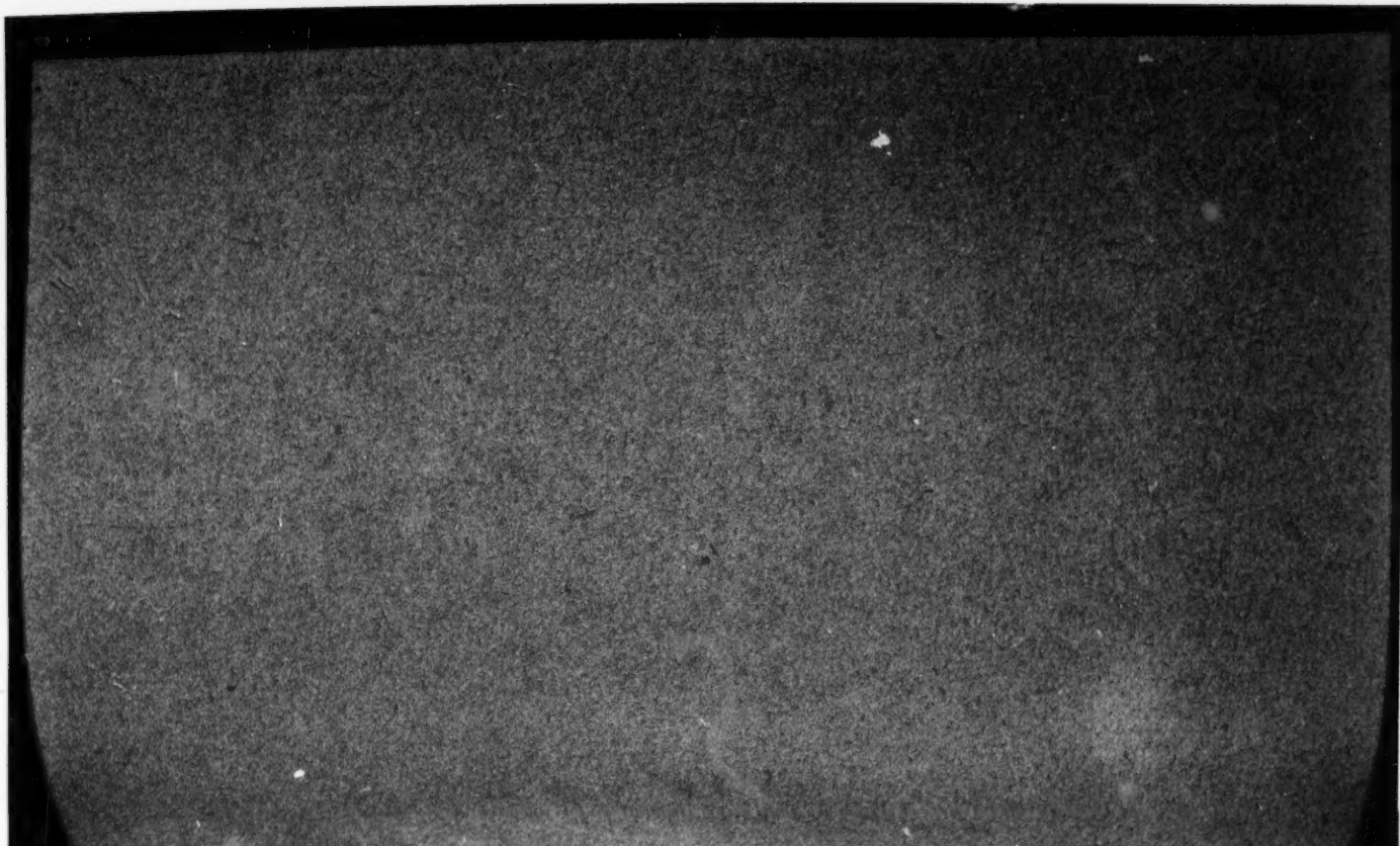
vs.

FRANK M. ARGUIMBAU, AS SURVIVING PARTNER OF THE COPARTNERSHIP COMPOSED OF FREDERICK A. SCHROEDER, EDWIN A. SCHROEDER, AND FRANK M. ARGUIMBAU, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF SCHROEDER & SON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

FILED FEBRUARY 1, 1905.

(19,623.)



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1 STATE OF FLORIDA:

In the Supreme Court.

Be it remembered that heretofore, to-wit: on the 12th day of January, 1904, the same being the first day of the January term, 1904, of the supreme court of the State of Florida, came the plaintiff in error, George W. Allen as administrator of the estate of John J. Philbrick, deceased, by his counsel and filed in the clerk's office of the supreme court of the State of Florida a transcript of record of the proceedings and judgment of the circuit court of the State of Florida for Monroe county, in a certain cause wherein Frank M. Arguimbau as surviving partner of the late firm of Schroeder & Bon, was a plaintiff and George W. Allen as administrator of the estate of John J. Philbrick, deceased, was defendant, and of the writ of error therein to the judgment of the circuit court therein rendered, which said transcript of record of the cause aforesaid and subsequent proceedings to judgment and writ of error therefrom is in the words and figures as follows, to-wit:

2 Transcript of record of proceedings in the circuit court of Monroe county, Florida, in the suit of Frank M. Arguimbau, as surviving partner of the late firm of Schroeder & Bon, plaintiff, *vs.* George W. Allen, as administrator of the estate of John J. Philbrick, deceased, defendant, therein pending.

On the 5th day of February, 1898, the original plaintiffs, Frederick A Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, as partners doing business under the firm name and style of Schroeder & Bon, filed their declaration in the words and figures following:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Monroe County,

FREDERICK A. SCHROEDER, EDWIN A. SCHROEDER, and Frank M. Arguimbau, as Partners, Doing Business under the Firm Name and Style of Schroeder & Bon, *vs.* HERMAN L. STRICKER, as Administrator of All and Singular the Goods, Chattels, and Credits Which Were of John Jay Philbrick, Deceased.	Assumpsit. Damages, $10,000.00.

Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, as part ners doing business under the firm name and style

of Schroeder & Bon, by Sparkman & Sparkman and Jefferson B. Browne, their attorneys, complain of Herman L. Stricker as administrator of all and singular the goods, chattels and credits which were of John Jay Philbrick, deceased, at the time of his death,
3 who died intestate who has been summoned to answer them upon an action on promises.

For that whereas the said John Jay Philbrick during his life time, to wit, on the 18th day of March, 1893, together with George W. Allen and Charles B. Pendleton by their two promissory notes now overdue, jointly and severally promised to pay to Horace R. Kelly, five thousand dollars two years after the date thereof; and the said Horace R. Kelly for a valuable consideration then and there endorsed the said notes to the Horace R. Kelly & Company, Limited, and the said Horace R. Kelly & Company Limited for a valuable consideration then and there endorsed the said notes to the plaintiffs, whereof the said John Jay Philbrick then and there had notice, and then and there in consideration of the premises promised to pay the amount of said notes to the plaintiffs according to the tenor and effect thereof, but did not pay the same.

And afterwards, to wit, on the 14th day of Sept. 1897, the said John Jay Philbrick died intestate, and on the 18th day of Sept. 1897 the said defendant was duly appointed as administrator of all and singular the goods, chattels and credits of the said John Jay Philbrick, deceased, and although often requested so to do has not paid the said notes to the plaintiffs' damage of ten thousand dollars.

And thereupon they bring suit, etc.

SPARKMAN & SPARKMAN AND
JEFFERSON B. BROWNE,
Attorneys for Plaintiffs.

4 $2500.00. KEY WEST, FLORIDA, March 18th, 1893.

Two years after date, we or either of us, promise to pay Horace R. Kelly, or order, the sum of twenty-five hundred dollars at Key West, Florida.

JOHN JAY PHILBRICK.
GEORGE W. ALLEN.
CHAS. B. PENDLETON.

(Endorsed:) Pay to the order of Horace R. Kelly & Co. Ltd. Horace R. Kelly & Co. Ltd. Per Horace R. Kelly, pres't.

$2500.00. KEY WEST, FLORIDA, March 18th, 1893.

Two years after date we or either of us promise to pay Horace R. Kelly or order the sum of twenty-five hundred dollars, at Key West, Florida.

JOHN JAY PHILBRICK.
GEO. W. ALLEN,
C HAS. B. PENDLETON.

(Endorsed:) Pay to the order of Horace R. Kelly & Co., Ltd.— Horace R. Kelly. Horace R. Kelly & Co. Ltd. Per Horace R. Kelly, pres't.

On the 7th day of March, 1898, the defendant Herman L Stricker filed the following plea:

5 Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Monroe County.

FREDERICK A. SCHROEDER, EDWIN A. Schroeder, and Frank M. Arguimbau, as Partners, Doing Business under the Firm Name and Style of Schroeder & Bond, vs. HERMAN L. STRICKER, as Administrator of All and Singular the Goods, Chattels, and Credits Which Were of John Jay Philbrick, Deceased.	Assumpsit. Damages, $10,000.00.

The defendant by G. Bowne Patterson, his attorney, says: That on the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick during his lifetime, that if he the said Philbrick together with George W. Allen and Charles B. Pendleton, would give to him their four (joint) promissory notes for $2500.00 each, two of said notes payable in one year from said date and two payable in two years from said date, he the said Horace R. Kelly would manufacture cigars in Key West; that the said notes in this action are two of the said four notes made and delivered to the said Horace R. Kelly by the said John Jay Philbrick, George W. Allen, and C. B. Pendleton in consideration of the promises and agreements aforesaid of the said Horace R. Kelly. That the consideration for which said notes were given wholly failed, said Horace R. Kelly failing to manufacture cigars in Key West as agreed and he refuses to perform the promises and agreements on his part in consideration for which the notes here sued on were given. That the said Horace R. Kelly Co. Limited, was never, and the said plaintiffs are not, *bona fide* holders of said notes for value, and in fact were never
6 holders of said notes for value, nor owners of said notes; that the said Horace R. Kelly Co., Limited, and the plaintiffs at the time of the alleged transfer of the said notes to them, had full knowledge of the said contract between the said John Jay Philbrick and the said Horace R. Kelly, and the failure of consideration for which said notes were given, and the transfer of the said notes to them was fraudulent and made to the said Horace R. Kelly Co., Limited, and to plaintiffs with their full knowledge and consent, in

fraud of the rights of the said John Jay Philbrick, and with the intent to prevent him from defending against a suit on said notes.

All of which said defendant is ready to verify.

HERMAN L. STRICKER,
Administrator.

Herman L. Stricker, being defendant in above cause, being duly sworn says that the foregoing plea is true to the best of his knowledge and belief.

HERMAN L. STRICKER.

Sworn to and subscribed before me this 7th day of March, A. D. 1898.

[NOTARIAL SEAL.]

GEO. L. LOWE,
Notary Public, State of Florida at Large.

On the 31st day of January, 1900, the plaintiffs filed the following suggestion of substitution and order of court:

7 In the Circuit Court of the Sixth Judicial Circuit of the State of Florida for Monroe County.

SHROEDER & BON
vs.
HERMAN L. STRICKER, as Administrator of John J. Philbrick, Deceased.

Now come the plaintiffs in the above entitled cause and show unto the court that since the last continuance of this cause, Herman L. Stricker has resigned as administrator and George W. Allen has been appointed administrator of John J. Philbrick instead of said Herman L. Stricker; and thereupon the plaintiffs pray that said suit may proceed against the said George W. Allen as administrator.

SPARKMAN & CARTER,
Attorneys for Plaintiffs.

The foregoing petition is granted and it is ordered that the name of George W. Allen as administrator be substituted for that of Herman L. Stricker.

Jan'y 31st, 1900.

J. B. WALL, Judge.

On the 25th day of January, 1900, the defendant filed the following pleas:

8 In the Circuit Court, Sixth Judicial Circuit of the State of Florida in and for Monroe County.

FREDERICK A. SCHROEDER, EDWIN A. SCHROEDER, and Frank M. Arguimbau, Partners, Doing Business under the Firm Name and Style of Schroeder & Bon, *vs.* GEORGE W. ALLEN, as Administrator of All and Singular the Goods, Chattels, and Credits Which Were of John J. Philbrick, Deceased.	Assumpsit. Damages, $10,000.

1. And now comes the defendant, by his attorneys, George Bowne Patterson and Macfarlane & Shackleford, and says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said Philbrick, together with George W. Allen and Charles B. Pendleton, would give him their four joint and several promissory notes, for two thousand five hundred dollars each, two of said notes payable in one year from said date and two payable in two years from said date, he, the said Horace R. Kelly, would manufacture cigars in Key West and at no other place. That the said notes in this action are two of the said four notes made and delivered to the said Horace R. Kelly by the said John Jay Philbrick, George W. Allen and Charles B. Pendleton in consideration of the premises and agreements aforesaid of the said Horace R. Kelly. That the consideration for which said notes were given wholly failed, because the said Horace R. Kelly failed and refused to manufacture cigars in Key West, as agreed, and he still fails and refuses to perform the promises and agreements on his part in con-

9 sideration for which the notes here sued on were given. That the said Horace R. Kelly & Company, Limited, was never, and the said plaintiffs are not, *bona fide* holders of said notes for value, and, in fact, were never holders of said notes for value, nor owners of said notes. That the said Horace R. Kelly & Company, Limited, and the plaintiffs, at the time of the alleged transfer of said notes to them, had full knowledge of the said contract between the said John Jay Philbrick and the said Horace R. Kelly and the failure of consideration for which said notes were given, and the transfer of said notes to them was fraudulent and made to the said Horace R. Kelly & Company, Limited, and to the plaintiffs with their full knowledge and consent in fraud of the rights of the said John Jay Philbrick and with the intent to prevent him from defending a suit on said notes; all of which the defendant is ready to verify.

2. And for a further plea the defendant, by his attorneys aforesaid, says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said

Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes, for two thousand five hundred dollars each, two of said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and at no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited. That the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly & Company, Limited, a corporation then existing judicially
10 dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia, to be known as the Horace R. Kelly Company. That the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, State of Florida, was to manufacture cigars and, before the same had been placed in packages or boxes as required by law and stamped as required by law, to sell the said cigars to the said Horace R. Kelly Company, and then and there to pack the same in boxes stamped with the number of a factory assigned to the said Horace R. Kelly Company by the collector of internal revenue of the United States and under labels of the said Horace R. Kelly Company and to place internal revenue stamps thereon as and for the Horace R. Kelly Company and cancel the same in its name, to keep a revenue book and make entries therein in the name of the said Horace R. Kelly Company and to do all things under the law necessary to have it appear as if the cigars had been made in a factory operated by the said Horace R. Kelly Company, when, in truth and in fact, the said cigars had been manufactured in a factory operated by the said Havana & Key West Cigar Company, Limited; all of which was contrary to law. And the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them. And this the defendant is ready to verify.

3. And for a further plea the defendant, by his attorneys aforesaid, says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John J. Philbrick, during his lifetime, that if he, the said
11 Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes, for two thousand five hundred dollars each, two of said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R.

Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited. That the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly & Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia, to be known as the Horace R. Kelly Company. That the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby the said Horace R. Kelly Company was to procure a factory number, or factory numbers, and hold itself forth as a manufacturer of cigars in the city of Key West, State of Florida, and its cigars were to be manufactured from the tobacco owned and possessed by the Havana & Key West Cigar Company, Limited, in its building and in the same room occupied by its cigar makers and its cigars were to be packed in the boxes of the factory of the said Horace R. Kelly Company in the same room where the cigars of the Havana & Key West Cigar Company, Limited, were packed, and the cigars were to be manufactured for the said Horace R. Kelly Company by the cigar makers employed and paid by the said Havana & Key
12 West Cigar Company, Limited, and the said cigars were to be picked and packed by pickers and packers employed and paid by the Havana & Key West Cigar Company, Limited, and the said cigars delivered to the said Horace R. Kelly Company at a certain price per thousand; all of which was contrary to law. And the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of said notes to them. And this the defendant is ready to verify.

G. BOWNE PATTERSON &
MACFARLANE & SHACKLEFORD,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Monroe.

I, George W. Allen, administrator of the estate of John J. Philbrick, deceased, being first duly sworn, depose and say that the matters and things contained in the foregoing pleas are true.

GEORGE W. ALLEN.

Subscribed and sworn to before me this 25 day of January, A. D. 1900.

GEO. W. REYNOLDS,
Clerk Ct. Ct.

13 On the 31st day of January, 1900, the plaintiffs filed the following demurrer to defendant's pleas:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida for Monroe County.

SCHROEDER & BON
vs.
GEORGE W. ALLEN, as Administrator of John J. Philbrick, Deceased.

Now come the plaintiffs in the above entitled cause and say that the second and third pleas filed by the defendant are bad in substance and in law and demur thereto.

SPARKMAN & CARTER,
Attorneys for Plaintiffs.

And, for substantial matters of law to be argued to the court, state the following:

1st. That said pleas, and neither of them, state any matter that constitutes a good defense to the suit brought by the plaintiffs; and

2nd. For other matters apparent on the face of said pleas.

SPARKMAN & CARTER,
Attorneys for Plaintiffs.

STATE OF FLORIDA,
County of Hillsborough.

Before the undersigned authority personally appeared W. A. Carter, who being duly sworn deposes and says that he is of counsel for plaintiffs in the above entitled cause, and that the foregoing demurrer is not interposed for delay.

W. A. CARTER.

Sworn to and subscribed before me this 22 day of January, A. D. 1900.

[SEAL.] SAM'L BORCHARDT,
Notary Public.

I hereby certify that the foregoing demurrer is well founded in point of law.

W. A. CARTER,
Attorney for Plaintiffs.

14 On the 24th day of March, 1900, the defendant filed the following amended pleas:

In the Circuit Court, Sixth Judicial Circuit of the State of Florida in and for Monroe County.

FREDERICK A. SCHROEDER, EDWIN A. Schroeder, and Frank M. Arguimbau, Copartners, Doing Business under the Firm Name and Style of Schroeder & Bon,	Assumpsit. Damages, $10,000.
vs.	
GEORGE W. ALLEN, Adm'r of the Estate of John Jay Philbrick, Deceased.	

And now comes the defendant, by his attorneys, G. Bowne Patterson and Macfarlane & Shackleford, and files these his amended pleas, and for a further plea says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia to be known as the Horace R. Kelly Company; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in ~~its~~ factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited, at its factory at Key West, Florida, to fill the orders for cigars secured by the said Horace R. Kelly Company were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a legible

and durable manner, the number of cigars contained therein and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen, president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes and that there
16 should be stamped, indented, burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the non-compliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and understandings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to verify.

2. And for a further plea this defendant says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly & Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia to be known as the Horace R. Kelly Company;
that the said Horace R. Kelly Company, when so formed, was
17 to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the said Havana & Key West Cigar Company, Limited, was not to securely affix, by pasting

on each box containing cigars manufactured by or for it, a label on which should be printed, besides the number of its manufactory and the district and State in which it was situated, these words: "Notice.—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned not to use either this box for cigars again or the stamp thereon again, nor to remove the contents of this box without destroying said stamp, under the penalties provided by law in such cases." That at the time of the making of said contract and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that "every manufacture of cigars shall securely affix, by pasting on each box containing cigars manufactured by or for him, a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: 'Notice.—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned not
18 to use either this box for cigars again, or the stamp thereon again, nor to remove the contents of this box without destroying said stamp, under the penalties provided by law in such cases;' and affixed a penalty for the non-compliance therewith. And the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the premises and undertakings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them. And this the defendant is ready to verify.

3. And for a further plea defendant says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly & Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia to be known as the Horace R. Kelly Com-
19 pany; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana &

Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the said Havana & Key West Cigar Company, Limited, should not enter daily in a book, the form of which was prescribed by the Commissioner of Internal Revenue, an accurate account of the quantity of cigars, stems, or cigar boxes, of whatever description manufactured, sold, consumed, or removed for consumption or sale, or removed from its place of manufacture, and that it should not, on or before the 10th day of each and every month, furnish to the collector of the district a true and accurate abstract from said book, verified by oath, of all such sales and removals made during the month next preceding. And at the time of the making of said contract, understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that every person now or hereafter engaged in the manufacture of cigars should daily enter in a book, the form of which should be prescribed by the Commissioner of Internal Revenue, an accurate account of the quantity of cigars, stems, or cigar boxes, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture, and should, on or before the 10th day of each and every month, furnish to the collector of the district a true and accurate abstract from such book, verified by his oath, of all such purchases, sales and removals made during the month next preceding, and affixed a penalty for the non-compliance therewith. And the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and understandings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them. And this the defendant is ready to verify.

4. And for a further plea this defendant says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company.

Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly & Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the
21 State of West Virginia to be known as the Horace R. Kelly Company; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the business of the Horace R. Kelly Company should be confined to the selling of goods exclusively and that the said Horace R. Kelly should attend to the selling of goods for the said Horace R. Kelly Company and should individually pay all expenses connected with such sales; that he should devote himself exclusively to the sale of goods for the said company to be manufactured by the said Havana & Key West Cigar Company, Limited, excepting that he should have the privilege to sell for his individual account cigars that retail for five cents not manufactured by the said Havana & Key West Cigar Company, Limited. And the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and understandings and agreements aforesaid. And the said Havana & Key West Cigar Company, Limited, did not fill all orders for cigars secured by the said Horace R. Kelly Company when such orders were approved by the president or manager of the said Havana & Key West Cigar Company, Limited, and the said Horace R. Kelly Company did not confine itself to the selling of goods exclusively and the said Horace R. Kelly did not devote him-
22 self exclusively to the selling of goods for the said Horace R. Kelly Company to be manufactured by the Havana & Key West Cigar Company, Limited, excepting cigars that retail for five cents not manufactured by the Havana & Key West Cigar Company, Limited; but the said Horace R. Kelly Company, when organized under the provisions of the said agreement above mentioned, became licensed manufacturers of cigars in the city of Key West and State of Florida and filled the orders for cigars that retailed for more than five cents secured by it to its own customers. And the defendant says that the plaintiffs had notice of all the matters hereinbefore set forth at the time of the alleged transfer of the said notes to them, and so the defendant says that the consideration

upon which the said notes sued on was made has wholly failed; and this the defendant is ready to verify.

G. BOWNE PATTERSON &
MACFARLANE & SHACKLEFORD,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Monroe.

I, George W. Allen, being duly sworn, depose and say that I have read the foregoing pleas interposed in my behalf and know the contents thereof and that the same *is* true.

GEORGE W. ALLEN.

Sworn to and subscribed before me this 24th day of M'ch, A. D. 1900.

[NOTARIAL SEAL.] E. W. RUSSELL,
D'p'ty Cl'k C't Ct.

23 On the 5th day of January, 1903, the plaintiff filed suggestions of death of Edwin A. Schroeder and Frederick A. Schroeder, in the words and figures following:

In the Circuit Court for Monroe County, Florida.

SCHROEDER & BON, Plaintiffs,
vs.
GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Defendant.

Now comes the plaintiff Frank M. Arguimbau, by Bisbee & Bedell, their attorneys, and suggest the death of Edwin A. Schroeder, who died on the 14th day of October, A. D. 1902, and of Frederick A. Schroeder, who died about Dec. 1st, 1899, and pray that the said action may be proceeded with in their names as such surviving partners of the late firm of Schroeder & Bon.

BISBEE & BEDELL,
Attorneys for Plaintiffs.

24 On the 16th day of January, 1902, plaintiff filed the following demurrer to defendant's pleas:

In the Circuit Court, Monroe County, Florida.

FRANK M. ARGUIMBAU, as Surviving Partner of the Late Firm of Schroeder & Bon,
vs.
GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick.
} Demurrer to Pleas.

Comes now the plaintiff by Bisbee & Bedell, his attorneys, and demurs to the said defendant's 2nd plea, filed January 25, 1900, on the following grounds:

1st. Because the facts of said plea constitute no defense.

2nd. Because the real consideration for the notes sued on was the promise of the said Kelly to have cigars manufactured in Key West, and the plea alleges no breach of the said promise, but admits he did have cigars manufactured in Key West.

3rd. Because the defendant's intestate derived the same benefit and advantage from the manufacture of cigars, by and through Horace R. Kelly, and the said Horace R. Kelly Company, under the alleged contract between the latter and a third party, whether said contract was legal or illegal and void; and said plea does not show that the General Government prevented the manufacture of cigars under said contract or made any objection thereto.

And the plaintiff demurs to the said 3rd plea by the said defendant filed January 25, 1900, on the following grounds:

1st. Because the facts therein constitute no defense to the action.

2nd. Because the real consideration of the said notes sued on, was the promise of Kelly to have or cause cigars to be manufactured in Key West, and said plea does not allege any breach of the said promise.

3rd. Because, even if the said alleged contract between the two companies therein named, was illegal or void, said plea does not show that the said intestate or defendant was injured thereby.

And plaintiff demurs severally to the four pleas filed by the said defendant March 24, 1900, on the following grounds:

1st. Because the facts stated in each plea, constitute no defense to the action.

2nd. Because the real consideration for the notes sued on was Kelly's promise to manufacture cigars in Key West, and neither of the said pleas alleges a breach of such promise.

3rd. Neither of the said pleas state facts showing the alleged contract between the said two companies was illegal or void.

4th. Even if the said contract between the said two companies was illegal or void, neither plea shows that said intestate or defendant was injured thereby.

And plaintiff demurs severally to each of the four pleas filed by Allen as administrator of the estate of John J. Philbrick on March 24th, 1900 on the following grounds:

1st. Because neither of said pleas state facts constituting any defense.

2nd. Because the consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, and no one of said pleas alleges a breach of said promise.

26 3rd. No one of said pleas avers that the alleged proposed contract between the two companies in said pleas stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder.

4th. That if cigars were manufactured in Key West, under the said contract between the said two companies in the said pleas stated, the defendant and his intestate derived the same benefit and received the same consideration for the said notes, whether said contract was legal or illegal.

BISBEE & BEDELL,
For Plaintiff.

And the plaintiff demurs to the first plea filed by Allen, as administrator, on the 25th day of January, A. D. 1900, upon the following grounds:

1st. Because said plea does not state facts constituting any defense to the action.

2nd. Because said plea does not specify wherein the consideration of said notes failed.

3rd. Because the consideration of said notes was, Horace R. Kelly's *promise* to have cigars manufactured at Key West, and not the performance of the said promise as shown by the said plea.

4th. Because so much of the said plea as avers that plaintiff was never the holder of the said notes for value, is immaterial, argumentative and states a legal conclusion.

5th. That the allegation of notice to plaintiff of the contract in the said plea stated, is immaterial.

6th. That the averment that the transfer of the said notes
27 to plaintiff was fraudulent, avers a conclusion and states no facts showing a fraudulent transfer of the said notes.

7th. For other grounds appearing on the face of the said plea, and especially that the plea does not allege that plaintiff before he acquired the said note, had notice of any breach by Kelly of his promise.

STATE OF FLORIDA, }
Duval County, } *ss:*

Personally appeared before me H. Bisbee, who being sworn says that he is one of the attorneys for the said plaintiff, and that the foregoing demurrers are not interposed for delay.

Subscribed and sworn to this 15th day of Jan'y, 1903.

——— ———.

I hereby certify that I believe the foregoing demurrers are well founded in law.

H. BISBEE.

Affidavit to the foregoing demurrers is hereby waived.

MACFARLANE & GLEN,
Att'ys for Def't.

In Circuit Court, Monroe County, State of Florida.

28 FRANK M. ARGUIMBAU, Surviving Partner of the Firm of Schroeder & Bon, Plaintiffs,
vs.
GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Defendant.

Replications and Withdrawal of Original Replications.

Comes now the said plaintiff by Bisbee & Bedell, his attorneys and takes issue upon the plea filed November 4, 1895 by all of the original defendants in this action; and takes issue upon the plea filed by Herman Striker as administrator of the estate of John J. Philbrick on the 7th day of March, 1898, except so much of the said pleas as admit the making of the said notes declared on.

2. And the plaintiff hereby withdraws the replications filed by all of the original defendants, Allen, Philbrick and Pendleton, on the 10th day of August, 1896.

BISBEE & BEDELL,
For Plaintiff.

On the 17th day of January, 1903, the court, after due notice given of the hearing, made the following ruling upon said demurrers:

Sixth Judicial Circuit of Florida, Circuit Court of Hillsborough County.

FRANK M. ARGUIMBAU, as Surviving Partner of the Firm of Schroeder & Bon,
vs.
GEORGE W. ALLEN.

29 FRANK M. ARGUIMBAU, as Surviving Partner of the Firm of Schroeder & Bon,
vs.
GEORGE W. ALLEN, Adm'r of John J. Philbrick.

These causes coming on to be heard upon the demurrers of the plaintiff to the pleas of the defendant filed on March 24th, 1900,

and on January 25th, 1900, in each of said causes, after argument by counsel for the respective parties, the court being advised of its opinion, it is thereupon considered by the court that the said demurrers, as to each of the said pleas demurred to, be and the same are hereby sustained; and it is ordered that the defendant in each of said causes do have until the rule day in February, A. D. 1903, to plead over as he may be advised.

Done and ordered at Tampa, Florida, this 17th day of January, A. D. 1903.

J. B. WALL, Judge.

On the 2nd day of February, 1903, the defendant filed the following amended pleas:

In the Circuit Court, Sixth Judicial Circuit of the State of Florida in and for Monroe County.

30 FRANK M. ARGUIMBAU, as Surviving Partner of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Partners, Doing Business under the Firm Name of Schroeder & Bon,
vs.
GEORGE W. ALLEN, as Administrator of the Estate of John Jay Philbrick. } Assumpsit.

Now comes the defendant, George W. Allen, as administrator of John J. Philbrick, deceased, and, for a plea to the declaration of the plaintiff herein says that at the time of the execution of the notes in plaintiff's declaration mentioned the said John J. Philbrick, George W. Allen and C. B. Pendleton were citizens of Key West and interested in its commercial development, and the said Horace R. Kelly then represented to them that if they would give him the notes aforesaid, together with two other notes of equal amount, he would maintain and operate a cigar factory in Key West for and during a space of three years thereafter and manufacture cigars therein during said period, and the said notes, and each of them, sued upon were executed by the said parties and delivered to the said Horace R. Kelly in consideration that the said Horace R. Kelly should maintain and operate said cigar factory for the manufacture of cigars in Key West during the period aforesaid, and manufacture cigars therein during said period, and for no other consideration, and the said Horace R. Kelly, after the execution and delivery to him of the notes sued upon, and prior to the indorsement or transfer thereof to *the* Horace R. Kelly and Company, Limited, or to the original plaintiffs herein, declined and refused to maintain and oper-
31 ate a cigar factory for the manufacture of cigars in Key West during the said period of three years, and wholly and absolutely discontinued and abandoned the manufacture of cigars in

Key West, and never thereafter manufactured or caused to be manufactured any cigars in Key West, whereby the consideration upon which the said notes were given has wholly failed; and the said Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued on, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify.

2. And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly in consideration of a promise of the said Horace R. Kelly that he would manufacture cigars at Key West, Florida, and at no other place, for and during the space of three years, and there was no other consideration for the said notes, or either of them, and the defendant alleges that the said promise of the said Horace R. Kelly in consideration of which the said notes were given, was illegal as being in restraint of trade and contrary to public policy; and the defendant further alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify.

32 3. And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly in consideration that he would comply with and perform a certain contract theretofore in existence, and made and then subsisting between him and one Max T. Rosen, president of the Havana & Key West Cigar Company, Limited, the terms of which are fully known to the plaintiff, and for no other or further consideration. Wherefore the defendant alleges that there was in truth and in fact no consideration for the notes sued upon, or either of them; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify.

4. And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace B. Kelly solely on the consideration of an agreement and promise of said Horace R. Kelly whereby he undertook that cigars should be manufactured at Key West, Florida, and at no other place, in accordance with and pursuant to the terms of a certain contract to be made between Horace R. Kelly and Company, a corporation which he un-

33 dertook to organize, and the Havana & Key West Cigar Company, Limited, whereby the latter was to manufacture, at its

factory in Key West, cigars to fill all orders for cigars secured by the said Horace R. Kelly & Company, and whereby the said cigars, when so manufactured, were to be removed from the said factory or place where the same were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a legible and durable manner, or in any manner, the number of cigars contained therein and the number of the manufactory in which said cigars had been manufactured, all of which was contrary to law, wherefore the consideration upon which the said notes sued upon were given was illegal; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant in ready to verify.

5. And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly solely in consideration of an agreement and promise of said Horace R. Kelly whereby he undertook that cigars should be manufactured at Key West, Florida, and at no other place, in accordance with and pursuant to the terms of a certain contract to be made between Horace R. Kelly and Company, a corporation which he undertook to organize, and the
34 Havana & Key West Cigar Company, Limited, whereby the latter was to manufacture, at his factory in Key West, cigars to fill all orders for cigars secured by the said Horace R. Kelly and Company, and whereby the said Havana & Key West Cigar Company, Limited, was not to securely affix, by pasting on each box containing cigars manufactured by or for it, or to affix at all, any label, or a label on which should be printed, besides the number of its manufactiry and the district and State in which it was situated, these words: "Notice.—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned not to use either this box for cigars again or the stamp thereon again, nor to remove the contents of this box without destroying said stamp, under the penalties provided by the law in such cases," all of which was contrary to law, wherefore the consideration upon which the said notes sued upon were given was illegal; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the endorsement and transfer of the notes sued upon to them, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify.

6. And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and deliverod by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly solely in consideration of an agreement and promise of the said Horace R. Kelly

whereby he undertook that cigars should be manufactured
35 at Key West, Florida, and at no other place, in accordance with and pursuant to the terms of a certain contract to be made between Horace R. Kelly and Company, a corporation which he undertook to organize, and the Havana & Key West Cigar Company, Limited, whereby the latter was to manufacture, at its factory in Key West, cigars to fill all orders for cigars secured by the said Horace R. Kelly & Company, and whereby the said Havana & Key West Cigar Company, Limited, should not enter daily in a book, the form of which was prescribed by the Commissioner of Internal Revenue, or enter at all, an accurate account of the quantity of cigars, stems or cigar boxes, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from its place — manufacture, and that it should not, on or before the tenth day of each and every month, or at all, furnish to the collector of the district a true and accurate abstract, or any abstract, from said book, verified by oath, of all such sales and removals made during the month next preceding, wherefore the consideration upon which the notes sued upon were given was illegal; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the endorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify.

MACFARLANE & GLEN,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Monroe.

36 I, George W, Allen, administrator of the estate of John Jay Philbrick, deceased, being first duly sworn, depose and say that the facts stated in the foregoing pleas are true, as I am informed and believe.

GEORGE W. ALLEN,
As Administrator of the Estate of John Jay Philbrick.

Subscribed and sworn to before me this 2 day of Feb'y, A. D. 1903.

[NOTARIAL SEAL.]

J. M. PHIPPS,
Notary Public.

On the — day of ——, 1903, the plaintiff filed the following demurrers:

STATE OF FLORIDA:

In the Circuit Court in and for Monroe County.

FRANK M. ARGUIMBAU, Surviving Partner of Frederick A. Schroeder, Edwin A. Schroeder, Frank M. Arguimbau, Late Partners, Doing Business under the Firm Name of Schroeder & Bon,

vs.

GEORGE W. ALLEN, Administrator *for* the Estate of John J. Schroeder, Deceased.

} Demurrers.

Now comes the plaintiff by Bisbee & Bedell, his attorneys, and severally demurs to each of the pleas hereinafter mentioned:

Plaintiff demurs to the first plea because it states no facts constituting a defense, and because it shows that the alleged consideration for the notes sued on was an independent contract by Horace
37 R. Kelly, the performance of which could not be made before the maturity of the said notes sued on; and because the said plea does not aver that the said Kelly did not manufacture any cigars in Key West, but impliedly admits he did manufacture cigars at Key West, and the consideration of the said notes was not apportionable.

Plaintiff demurs to the second plea on the ground that the facts thereof constitute no defense, and on the further ground that it does not show that the island of Key West is not large enough to make it impracticable for Horace R. Kelly if he had capital enough, to manufacture cigars enough to supply the demand for cigars for all the civilized and uncivilized world.

And plaintiff demurs to the said third plea,—first, because it does not set forth any facts constituting a defense; because it does not set forth the alleged contract between Rosin and Kelley, and the court cannot say without such contract before it, whether or not it constituted a consideration of the said notes; and because the said plea does not exclude or preclude the conclusion that the said Horace R. Kelley was not under any obligation to the defendant, by virtue of the promise of said Kelley at the time said notes were made to perform the said contract; and because said plea does not show that at the time said notes were made, the said Kelley was under any obligation to the defendant to perform the said contract between Rosin and said Kelley, and because there is nothing
38 in the said plea to establish that there was no consideration for the said notes.

And plaintiff demurs to each of the fourth, fifth and sixth pleas on the grounds, first,—no facts as stated in either constitute any defense; second, that the consideration alleged in each of the said pleas for the notes was the manufacture of cigars at Key West and the mode and manner of such manufacture, or pursuant to the

terms of some contract not then in existence, which the defendant could not have known whether it was legal or illegal, is wholly immaterial to the defendant; third, because the plea does not show that cigars were not manufactured at Key West by or through the procurance of Horace R. Kelly, and because if they were so manufactured defendant received the same consideration, whether the said contract to be made after the said notes were given, was legal or illegal, and for divers other grounds appearing on the face of the said fourth, fifth and sixth pleas.

STATE OF FLORIDA,
County of Duval, } ss:

I, H. Bisbee, being one of the attorneys for the plaintiff in the above entitled action, being first duly sworn, depose and say that the foregoing demurrers are not interposed for delay.

I hereby certify that in my judgment, opinion and belief, the foregoing demurrers are well founded in law.

H. BISBEE,
Of Counsel.

39 On the 27th day of June, 1903, the court, after due notice given, made the following ruling on said demurrers:

In the Circuit Court, Monroe County.

FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon, vs. GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased.	Order Sustaining Demurrer and Final Judgment.

This action was heard upon the several demurrers to the several pleas filed by George W. Allen, as administrator of John J. Philbrick, deceased, on the — day of February, A. D. 1903; and was argued by counsel for the respective parties.

On consideration thereof it is now ordered that each of the said demurrers to each one of the said plans be and they are hereby sustained.

It is further ordered that the clerk of the said court, assess the damages upon the notes sued on and on file, and enter up final judgment thereon for the plaintiff.

June 27, 1903.

J. B. WALL, Judge.

40 On the — day of ——, 1903, the plaintiff filed the following motion to strike certain pleas of the defendant:

STATE OF FLORIDA:

In the Circuit Court in and for Monroe County.

FRANK M. ARGUIMBAU, Surviving Partner of Frederick A. Schroeder, Edwin A. Schroeder, Frank M. Arguimbau, Late Partners, Doing Business under the Firm Name of Schroeder & Bon,

vs.

GEORGE W. ALLEN, Administrator *for* the Estate if John J. Shroeder, Deceased.

} Motion to Strike.

Now comes the plaintiff by Bisbee & Bedell, his attorneys, and moves to strike certain of the last series of pleas filed on the — day of February, 1903,

Plaintiff moves to strike all of the said pleas numbered 1 to 6 inclusive on the ground that they are not verified or sworn to as the law and the rules of the court require.

Plaintiff moves to strike the first of the said pleas on the further ground that it is so inconsistent with all the other pleas except the second, that the proof of the truth of the first plea would
41 prove the falsity of the third to the sixth inclusive, and because the first plea is a repetition of a former plea held bad on demurrer.

Plaintiff moves to strike the third plea on the further ground that the proof of its truth would prove the falsity of the first, fourth, fifth and sixth pleas.

Plaintiff moves to strike the fourth, fifth and sixth pleas on the further ground that they are repetitions of pleas in this action, already held bad on demurrer, and because they are so inconsistent with the first and third pleas that the proof of their truth would prove the falsity of the first and third pleas.

And on further grounds appearing on the face of the said plea.

H. BISBEE,
For Plaintiff.

42 On the 25th day of July, 1903, the court rendered final judgment in the words and figures following:

In the Circuit Court for Monroe County, Florida.

FRANK M. ARGUIMBAU, as Surviving Partner of the Co-partnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm Name and Style of Schroeder & Bon,

vs.

GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, deceased.

And heretofore, to-wit: on this 18th day of May, A. D. 1903, come to the parties to this action, Frank M. Arguimbau, as surviving partner of the co-partnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, lately doing business under the firm name and style of Schroeder & Bon, plaintiff, and George W. Allen, as administrator of the estate of John J. Philbrick, deceased, defendant, by their respective counsel and argued and submitted the several demurrers of the said plaintiff to the several pleas of the said defendant, as administrator as aforesaid, filed herein on the — day of February, A. D. 1903.

Upon consideration whereof, it was ordered by the court that each of the said demurrers to each of the said several pleas be and there were thereby sustained; and that it was thereby further ordered that the clerk of this court assesses the damages upon the notes sued on and now on file; and enter up final judgment
43 thereon for the said plaintiff, as by the order of the said court bearing date the 27th day of June, A. D. 1903, appears of record.

And, the said notes having been this day produced and submitted to the said clerk of the said court, and by him filed, and the damages of the said plaintiff by reason of the breach of the promises contained in said notes over and above his costs and charges by him about this suit in this behalf expended having been by said clerk in pursuance of said order assessed in the sum of eight thousand, three hundred and twenty dollars, and those costs and charges taxed by the clerk at — dollars.

Therefore it is considered that the said Frank M. Arguimbau as surviving partner of the co-partnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, lately doing business under the firm name and style of Schroeder & Bon, do have and recover from the said George W. Allen, as administrator of the estate of John J. Philbrick, deceased, to be levied and made of the goods and chattels lands and tenements of the estate of John J. Philbrick, deceased, in the hands of the administrator to be administered, the damages, costs and charges by said clerk in form aforesaid assessed, and also — dollars for his costs and charges by the court aforesaid now here adjudged to the said Frank M. Arguimbau, as surviving partner of the co-partnership composed of

Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau lately doing business under the firm name and style of Schroeder & Bon, with his assent; which said damages, costs and charges in the whole amount to — dollars, for which let
44 execution issue against the goods and chattels lands and tenements of the estate of John J Philbrick, deceased.

J. B. WALL,
Circuit Judge.

On the 4th day of August, 1903, writ of error issued, which said writ of error, with the certificate of recordation thereof by the clerk of the circuit court for Monroe county, is in the words and figures following:

Writ of Error.

STATE OF FLORIDA, ss:

The State of Florida to the judge of the circuit court of the sixth judicial circuit of the State of Florida in and for Monroe county, Greeting:

Because in the record and proceedings and also in the rendition of judgment in a certain cause which is in our said circuit court before you, between Frank M. Arguimbau, as surviving partner of the co-partnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, as plaintiff, and George W. Allen, as administrator of the estate of John J. Philbrick, deceased, as defendant, manifest error hath happened, as it is said, to the great damage of the said George W. Allen, as administrator of the estate of John J. Philbrick, deceased, as by his complaint appears.

We, willingly that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties
45 aforesaid in this behalf, do command you that, if judgment be therein rendered, you distinctly and openly send the record and proceedings aforesaid with all things touching them, under your seal, together with this writ, to our supreme court of the State of Florida, so that you have the same at Tallahassee on the 12th day of January, A. D. 1904, in our said supreme court to be then and there held, that inspecting the record and proceedings aforesaid, our said supreme court may cause further to be done therein, to correct that error, what of right and according to law should be done.

Witness the Honorable R. Fenwick Taylor, chief justice of the said supreme court, and the seal of the said circuit court, this 4th day of August, in the year of our Lord one thousand nine hundred and three.

Circuit Court Seal.

GEO. W. REYNOLDS,
Clerk of the Circuit Court of Monroe County,
By D. Z. TRILER, Deputy.

I hereby certify that the within writ of error was duly lodged and filed in the circuit court of Monroe county, Florida on the 4th day of August, A. D. 1903, and duly recorded in the minute book of the circuit court in book — at page 672 thereof.

Witness my hand and the seal of the circuit court of
46 Monroe county, Florida, at Key West, this 4th day of August, A. D. 1903.

GEO. W. REYNOLDS,
Clerk Circuit Court of Monroe County, Florida,
By D. Z. TRILER, D. C.

On the 11th day of August, 1903, the defendant filed his supersedeas bond, in the words and figures following:

Know all men by these presents that George W. Allen, as administrator of the estate of John J. Philbrick, deceased, and the Fidelity Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly authorized under the laws of the State of Florida to do business as a surety company, are held and firmly bound unto Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, in the penal sum of ten thousand dollars, for the payment whereof well and truly to be made they bind themselves and their legal representatives, jointly and severally, firmly by these presents.

Signed and sealed on this 7th day of August, A. D. 1903.

The condition of the foregoing obligation is such that whereas the obligee above named recovered a judgment in the circuit court of Monroe county, Florida, on the 25th day of July, A. D. 1903, against the above bounden George W. Allen, as administrator of the
47 estate of John J. Philbrick, deceased, for the sum of $8,320.00 and the latter desires to sue out a writ of error from the said judgment returnable to the next ensuing term of the supreme court of Florida, to-wit: the January term, A. D. 1904, and further desires that the said writ of error shall operate as a supersedeas of the said judgment.

Now, therefore, if the above named obligors shall well and truly pay the amount of the aforesaid judgment, with interest and costs, if the same shall be affirmed by the appellate court, then this obligation shall become null and void, otherwise it shall remain in full force and virtue.

GEORGE W. ALLEN, [SEAL.]
As Administrator of the Estate of
John J. Philbrick, Deceased.
[CORPORATE SEAL.] FIDELITY DEPOSIT CO. OF MD.,
By E. W. MONROSE, Ag't & Att'y.

On the — day of August, 1903, the defendant filed the following assignment of errors:

Sixth Judicial Circuit of Florida, Circuit Court of Monroe County.

FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon,
vs.
GEORGE W. ALLEN, as Administrator of John J. Philbrick, Deceased.

Now comes the defendant in the above stated cause, George
48 W. Allen, as administrator of the estate of John J. Philbrick, deceased, by his attorneys Macfarlane & Glen, and hereby makes the following complete assignment of all the errors he intends to rely upon in the appellate court for reversal of the judgment in the above stated cause, viz:

1st. That the court erred in rendering final judgment against the defendant when an issue remained undisposed of, to wit, the issue upon the plea of defendant filed on March 7th, 1893, upon which plaintiff joined issue.

2nd. That the court erred in sustaining plaintiff's demurrer to defendant's first plea filed on January 25th, 1900.

3rd. That the court erred in sustaining plaintiff's demurrer to defendant's first plea filed on March 24th, 1900.

4th. That the court erred in sustaining plaintiff's demurrer to defendant's second plea filed on March 24th, 1900.

5th. That the court erred in sustaining plaintiff's demurrer to defendant's third plea filed on March 24th, 1900.

6th. That the court erred in sustainimg plaintiff's demurrer to defendant's fourth plea filed on March 24th, 1900.

7th. That the court erred in sustaining plaintiff's demurrer to defendant's first amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

8th. That the court erred in sustaining plaintiff's demurrer to defendant's second amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

9th. That the court erred in sustaining plaintiff's demurrer to defendant's third amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

10th. That the court erred in sustaining plaintiff's de-
49 murrer to defendant's fourth amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

11th. That the court erred in sustaining plaintiff's demurrer to defendant's fifth amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

12th. That the court erred in sustaining plaintiff's demurrer to defendant's amended plea filed in pursuance of leave of the court on the 2nd day of February, A. D. 1903.

MACFARLANE & GLEN,
Attorneys for Defendant.

Service of the foregoing assignment of errors accepted this 20th day of August, A. D. 1903.

BISBEE & BEDELL,
Attorneys for Plaintiff.

On the — day of August, 1903, the defendant filed his written direction to the clerk of the circuit court for making up the transcript of the record, in the words and figures following:

Sixth Judicial Circuit of Florida, Circuit Court of Monroe County.

FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon,
vs.
GEORGE W. ALLEN, as Administrator of John J. Philbrick, Deceased.

50 Now comes the defendant in the above stated cause, George W. Allen, as administrator of the estate of John J. Philbrick, deceased, by his attorneys Macfarlane & Glen, and hereby makes the following written direction to the clerk for making up the transcript of the record in the above stated cause, *viz:*

The said clerk will copy into the said transcript and make a part thereof, the following papers and proceedings, to wit:

1st. Plaintiff's declaration filed on February 5th, 1898.
2nd. Plea of H. L. Stricker, administrator, filed March 7th, 1898.
3rd. Suggestion of substitution of George W. Allen as administrator and order substituting him as defendant made January 31, 1900.
4th. Pleas filed on January 25th, 1900.
5th. Pleas filed on March 24th, 1900.
6th. Demurrers to pleas and replication filed January 16, 1903.
7th. Order on demurrers made on January 17th, 1903.
8th. Amended pleas filed on February 2nd, 1903.
9th. Demurrers to said pleas last mentioned.
10th. Order on said demurrers made June 27th, 1903.
11th. Final judgment rendered July 25th, 1903.
12th. Writ of error as recorded in minutes of court.
13th. *Supersedeas* bond.
14th. Assignment of errors.
15th. This written direction.

51 You will not recite any papers or proceedings in said cause, and you will omit from the said transcript all papers and proceedings not herein directed to be included therein; and you will commence to make up the said transcript on the 31st day of August, A. D. 1903.

MACFARLANE & GLEN,
Attorneys for Defendant.

Service of the foregoing direction accepted this 20th day of August, A. D. 1903.

BISBEE & BEDELL,
Attorneys for Plaintiff.

On the 28th day of August, 1903, the plaintiff filed the following additional written directions to the clerk for making up the transcript of the record:

In the Circuit Court, Monroe County, Florida.

FRANK M. ARGUIMBAU, as Surviving Partner of the Late Firm of Schroeder & Bon,
vs.
GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick.

To the clerk of the circuit court for Monroe county, Florida:

The plaintiff in the above entitled cause, Frank M. Arguimbau, as surviving partner of the copartnership composed of Fred-
52 erick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, lately doing business under the firm name and style of Schroeder & Bon, makes the following additional directions to the clerk for making up the transcript of the record in the above stated cause, viz.:

In addition to the papers and proceedings by defendant directed to be copied into the said transcript and made a part thereof, the said clerk will copy into said transcript and make a part thereof the following papers and proceedings, to wit:

1. Demurrers to pleas filed January 31st, 1900.
2. The suggestions of death of Frederick A. Schroeder and Edwin A. Schroeder, 2½ and orders on such suggestions.
3. Withdrawal of replications filed January 16th, 1903.
4. Withdrawal, by leave of court, or applications including replication to plea of March 7th, 1898.
5. Order allowing withdrawal last mentioned.
6. Motion to strike defendant's pleas of February 2nd, 1903.
7. These additional directions.

BISBEE & BEDELL,
Attorneys for Plaintiff.

53 I, George W. Reynolds, clerk of the circuit court in and for the county of Monroe, State of Florida, do hereby certify that the foregoing pages numbered from one to 51 inclusive contain a correct transcript of the record of the judgment in the case of Frank M. Arguimbau, as surviving partner of the co-partnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of

Schroeder & Bon, plaintiffs, against George W. Allen as administrator of the estate of John J. Philbrick, deceased, defendant, and a true and correct recital and copy of all such papers and proceedings in said cause, as appears upon the record and files of my office, that have been directed to be included in said transcript by the written demands of the said parties.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 4 day of December, A. D. 1903.

[SEAL.] GEO. W. REYNOLDS,
Clerk of the Circuit Court for the County of Monroe.

54 And on the same day, to-wit: on the 12th day of January, A. D. 1904, the supreme court made an order in the words and figures following, to-wit:

Supreme Court of Florida, January Term, A. D. 1904.

GEORGE W. ALLEN, as Adm'r, &c., Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner, &c., Defendant in Error.

This cause is this day submitted to the court upon briefs by counsel for the respective parties, but the court not being advised of its judgment in the premises time is taken to consider thereof.

And afterwards, to-wit: on the 24th day of May, A. D. 1904, the supreme court made an order that the case be set for oral argument on the 31st day of May, 1904, which order is in the words and figures following, to-wit:

Supreme Court of Florida, January Term, A. D. 1904.

GEO. W. ALLEN, as Administrator, &c., Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner, &c., Defendant in Error.

55 A memorandum for oral argument having been filed in this cause, it is ordered that the same be set for such oral argument on Tuesday, the 31st instant, and the clerk is directed to notify counsel for the respective parties thereof.

And afterwards, to-wit: on the 31st day of May, A. D. 1904, the supreme court made an order in the words and figures following, to-wit:

Supreme Court of Florida, January Term, A. D. 1904.

GEO. W. ALLEN, as Administrator, &c., Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner, &c., Defendant in Error.

This cause is this day submitted to the court upon oral argument by counsel for the respective parties (brief having heretofore been filed), but the court not being advised of its judgment in the premises, time is taken to consider thereof.

And afterwards, to-wit: on the 30th day of July, A. D. 1904, the supreme court of Florida filed with the clerk of said court its memorandum decision in the words and figures following, to-wit:

56 In the Supreme Court of Florida, Division A, June Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon, Defendant in Error.
} Monroe County.

Per Curiam:

This cause coming on for final hearing upon the transcript of the record and briefs of the respective parties, and having been duly considered by division A, and no error being made to appear, it is, therefore, considered, ordered and adjudged by the court that the judgment of the circuit court, to review which this writ of error was prosecuted, be and the same is hereby affirmed at the cost of the plaintiff in error.

And afterwards, to-wit: on the same day, the 30th day of July, A. D. 1904, the supreme court of Florida rendered its judgment in the cause, which judgment is in the words and figures following, to-wit:

Supreme Court of Florida, June Term, A. D. 1904, Division A.

57 GEO. W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon, Defendant in Error.

Upon Writ of Error to a Judgment of the Circuit Court within and for the County of Monroe.

This cause having been submitted to the court at a previous term thereof upon a transcript of the record of the judgment aforesaid and the argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the court that the said judgment of the circuit court be and is hereby affirmed; and it is further ordered that the defendant in error do recover of the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of —; all of which is ordered to be certified to the court below.

The decision of the court in this cause was this day read and ordered to be filed.

* * * * * * *

R. F. TAYLOR,
Chief-Justice Supreme Court of Florida.

58 And afterwards, to wit, on the 6th day of August, A. D. 1904, the plaintiff in error, by his counsel, filed his petition for a rehearing, which petition is in the words and figures following, to wit:

In the Supreme Court of Florida, June Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner, &c., Defendant in Error.

To the honorable justices of the supreme court of Florida:

The petition of George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, in the above stated cause, would respectfully show unto the court as follows:

That on the 30th day of July, A. D. 1904, the court through di-

vision A, rendered a final judgment in the above stated cause affirming the judgment of the court below, and that no opinion was filed by the court so that your petitioner is not advised of the grounds of the said decision.

That in the said cause a certain plea was filed by your petitioner, which appears upon pages 29 to 30 of the transcript of the record in said cause, whereby your petitioner pleaded that the notes sued upon were given solely upon an executory consideration, which had been repudiated by the payee therein, prior to the endorsement and transfer thereof, of which the plaintiff and his predecessors in title had notice.

59 That the said plea was pleaded in pursuance of section 1072 of the Revised Statutes of Florida, which permits a partial as well as a total failure of consideration to be pleaded in all actions upon promissory notes.

That inasmuch as no written opinion was filed in said cause, your petitioner does not know the grounds of the decision of the court in said cause, but your petitioner is advised that his counsel did not call to the attention of the court the provisions of said section 1072 of the Revised Statutes of Florida in connection with the said plea, and your petitioner is advised by his counsel that the said plea, considered in connection with said section of the Revised Statutes and the common law in force in this State, is an absolutely good plea to the said action, and that the court in affirming the decision of the court below must have inadvertently overlooked the true force and effect of the said plea, owing to the failure of his said counsel to properly argue the same in such a manner as to make the full force of the said plea intelligible to this honorable court.

That your petitioner is further advised that the mistake of his said counsel in failing to fully and intelligibly present the said plea to this honorable court, in connection with the section of the Revised Statutes referred to above, arose from the fact, as your petitioner is advised by his counsel, that they did not consider it possible that the judgment of the court below, sustaining the demurrer of the defendant to the said plea upon the grounds set forth in the said demurrer, could by any possibility be sustained by this court.

That your petitioner is further advised by his counsel, and fully believes, that the said plea hereinbefore mentioned, is an absolutely good plea in bar of the plaintiff's action, notwithstanding the fact that owing to the failure of his counsel to properly argue the

60 same, this honorable court has reached a contrary conclusion, without a consideration of the applicability of the said section 1072 of the Revised Statutes in regard to the subject matter thereof.

That your petitioner is further advised, and fully believes, that upon a proper consideration of the said plea, in connection with the provisions of law, statutory and otherwise, applicable thereto, this honorable court could not come to a conclusion other than that the said plea is a good plea in bar of the plaintiff's action, and that the

failure of your petitioner's counsel to fully argue the same arose solely from the fact that they were over-confident of the merit of the said plea.

Wherefore, your petitioner prays for a rehearing of said cause for the purpose of fully presenting the said plea to this honorable court.

And your petitioner will ever pray, &c.

MACFARLANE & GLEN,
Counsel for Petitioner.

And afterwards, to-wit: on the 30th day of November, A. D. 1904, the supreme court made an order denying the petition for rehearing, which order is in the words and figures following, to-wit:

Supreme Court of Florida, June Term, A. D. 1904, Division A.

61 GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner of Schroeder & Bon, Defendant in Error.
} Monroe County

A petition for rehearing having been filed in this cause, and the same having been considered, and the court being advised of its judgment in the premises, it is ordered that the prayer of the petition be and the same is hereby denied; and upon written request of counsel for the plaintiff in error it is further ordered that the clerk withhold the mandate herein for 20 days.

And afterwards, to-wit: on the 27th day of December, A. D. 1904, came the plaintiff in error by counsel and filed in the office of the clerk of said supreme court of Florida an assignment of error in the Supreme Court of the United States on writ of error, said assignment of errors being hereto next attached, being as follows:

62 In the Supreme Court of the State of Florida, June Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John Philbrick, Deceased, Plaintiff in Error,
v.
FRANK M. ARGUIMBAU, as Surviving Partner of the Copartnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm Name and Style of Schroeder & Bon, Defendant in Error.

Now comes the plaintiff in error in the above stated cause and files the following as an assignment of the errors he intends to

rely upon in the Supreme Court of the United States on his writ of error prosecuted to the said Supreme Court of the United States in the above stated cause, viz:

1. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the first plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3397 of the Revised Statutes of the United States.

2. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the second plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said
63 plea constituted no defense to the suit of the plaintiff under section 3393 of the Revised Statutes of the United States.

3. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the third plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3390 of the Revised Statutes of the United States.

4. That the said supreme court of the State of Florida erred in its final judgment renderrd on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the fourth plea of the defendant filed on February 2nd, 1903, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3397 of the Revised Statutes of the United States.

5. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the fifth plea of the defendant filed on February, 2nd, 1903, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3393 of the Revised Statutes of the United States.

6. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the sixth plea of the defendant filed on February 2nd, 1903, was properly sustained, and that the

said plea constitued no defense to the suit of the plaintiff un-
64 der section 3390 of the Revised Statutes of the United States.

Wherefore in order that the foregoing assignments of error may be and appear of record, the defendant presents the same to the court and prays that such disposition thereof be made as — in accordance with law and the statutes of the United States in such cases made and provided, and the defendant prays a reversal of the judgment in the said cause made and entered by the said court.

HUGH C. McFARLANE AND
JAMES F. GLEN,
Counsel for Plaintiff in Error.

Filed Dec. 27, 1904.

B. B. WILSON,
Clerk Supreme Court.

65 And afterwards, to-wit: on December 27, 1904, came the plaintiff in error, by counsel, and filed in open court before the chief justice his petition for the allowance of a writ of error to said judgment, returnable before the Supreme Court of the United States, according to law, which petition is in the words and figures as follows, to-wit:

In the Supreme Court of the State of Florida, June Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner of the Copartnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm Name and Style of Schroeder and Bon, Defendant in Error.

The above named George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, conceiving himself aggrieved by the final judgment of the supreme court of the State of Florida, made and entered on the 30th day of July, A. D. 1904, in the above stated cause, whereby it was considered and adjudged by the said supreme court of the State of Florida, that the final judgment of the circuit court of the sixth judicial circuit of Florida in and for Monroe county, should be and was affirmed, does
66 hereby petition the Honorable R. Fenwick Taylor, chief-justice of the said supreme court of the State of Florida, for an order allowing a writ of error in the said cause, to the end that the said judgment of the supreme court of the State of Florida may be reviewed by the honorable Supreme Court of the United States of America, returnable to the said Supreme Court of the United States of America, under and according to the laws of the United

States of America in that behalf made and provided, and also that an order may be made herein fixing the amount of security which the said plaintiff in error shall give and furnish upon the said writ of error, to the end that the same may operate as a supersedeas, and that thereupon all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray, &c.

HUGH C. MACFARLANE AND
JAMES F. GLEN,
Counsel for Plaintiff in Error.

Whereupon on the same day the prayer of the petition was granted by an order of the chief-justice, in words and figures as follows, to-wit:

In the Supreme Court of the State of Florida, June Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John J. Philbrick, Deceased, Plaintiff in Error,
vs.
FRANK M. ARGUIMBAU, as Surviving Partner of the Copartnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm
67 Name and Style of Schroeder & Bon, Defendant in Error.

At a stated term, to-wit, the June term, A. D. 1904, of the supreme court of the State of Florida, held at the court room in the city of Tallahassee, Florida, on the 27th day of December, A. D. 1904, upon motion of Hugh C. Macfarlane and James F. Glen, attorneys for the above named plaintiff in error, and upon filing a petition for a writ of error and an assignment of errors, and the judgment of the supreme court of the State of Florida upon which the said writ of error is prayed, in the several respects in which the same is questioned by the said assignment of errors, having denied to the plaintiff in error the validity of a defense or defenses asserted by him under the laws of the United States of America, and the said judgment of the supreme court of the State of Florida, in the several respects in which the same is questioned by the said assignment of errors having proceeded on the sole ground that the respective defenses as pleaded — asserted by the plaintiff in error under the laws of the United States of America should be denied and overruled, and the said judgment of the supreme court of Florida having denied to the plaintiff in error a title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America, it is ordered that a writ of error be and is hereby allowed, to have reviewed in the Supreme Court of the United States the judgment of the said supreme court

of the State of Florida heretofore rendered in said cause, returnable according to law; and the amount of security upon the said writ of error is hereby fixed at the sum of three thousand dollars.

Done and ordered this 27th day of December, A. D. 1904.

R. F. TAYLOR,
Chief-Justice of the Supreme Court
of the State of Florida.

68 And thereafter upon the same day upon presentation to the chief-justice of said petition for the allowance of a writ of error, the same was allowed by the chief-justice, as appears upon the original writ of error accompanying this return; and upon the same day a citation was allowed by the chief-justice as appears upon the original citation accompanying this return to the writ of error aforesaid.

And thereafter on December 31, 1904, and during the said term of the court the original bond of plaintiff in error in this writ of error, approved by the Honorable R. F. Taylor, chief-justice of the supreme court of the State of Florida, was filed in the words and figures as follows, to-wit:

Know all men by these presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly authorized under the laws of the State of Florida, to do business in the State of Florida, is held and firmly bound unto Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, in the penal sum of three thousand ($3,000.00) dollars, for the payment whereof well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed on this the 29th day of December, A. D. 1904.

The condition of the foregoing obligation is such, that whereas, George W. Allen, as administrator of the estate of John J. Philbrick, deceased, has sued out a writ of error from the judgment of the supreme court of the State of Florida, in a certain cause therein pending, wherein he was plaintiff in error and the above named Frank M. Arguimbau, surviving partner as hereinbefore described, was defendant in error, rendered in the June term, A. D.

69 1904, of the said supreme court of the State of Florida, wherein the said court affirmed a certain judgment of the circuit court of the sixth judicial circuit of the State of Florida, in and for Monroe county, the said writ of error being returnable to the Supreme Court of the United States at Washington, on the 28th day of January, A. D. 1905.

Now, if the said George W. Allen as administrator of the estate of John J. Philbrick, deceased, shall prosecute the said writ of error to effect and if he fail to make his plea good, shall answer all damages

and costs, then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

[Seal of Fidelity & Deposit Co. of Maryland.]

FIDELITY & DEPOSIT CO. OF MARYLAND.
D. F. CONOLEY, Att'y. [SEAL.]
E. W. MONROSE, Att'y.

Taken and approved this 31st day of December, A. D. 1904.

R. F. TAYLOR,
Chief-Justice of the Supreme Court of Florida.

70 I, B. B. Wilson, clerk of the supreme court of the State of Florida, *her* hereby certify that the foregoing pages numbered from one (1) to sixty-nine (69) inclusive constitute and contain a full, true and complete transcript of the record and proceedings had, papers filed, rulings made, memorandum decision delivered, judgment rendered and all orders entered in the supreme court of Florida in the above entitled cause of George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, *vs.* Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, defendant in error, as appear upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court at Tallahassee, the capital, this 23rd day of January, A. D. 1905.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

71 The foregoing transcript of the record of the proceedings of the supreme court of the State of Florida in the case of George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, *vs.* Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, defendant in error, is transmitted to the Supreme Court of the United States in obedience to the writ of error issued herein, the original of which is hereto attached.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk of the Supreme Court of the State of Florida.

72 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Florida before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, and Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said George W. Allen, as administrator of the estate of John J. Philbrick, deceased, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 28th day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31st day of December, in the year of our Lord one thousand nine hundred and four.

[Seal U. S. Circuit Court, Northern Dist. of Florida.]

F. W. MARSH,
Clerk United States Circuit Court, Fifth
Circuit and Northern District of Florida,
By J. J. HODGES, Dep. Clerk.

Allowed by
R. F. TAYLOR,
Chief Justice of the Supreme Court of the State of Florida.

[Endorsed:] In the Supreme Court of the United States, October term, A. D. 1904. George W. Allen, as administrator of the estate of John J. Philbrick, deceased, plaintiff in error, *v.* Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder and Bon, defendant in error. Writ of error. Filed Dec. 31, 1904. B. B. Wilson, clerk supreme court.

73 UNITED STATES OF AMERICA, *ss:*

To Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Florida, wherein George W. Allen, as administrator of the estate of John J. Philbrick, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. Fenwick Taylor, chief justice of the supreme court of the State of Florida, this 31st day of December, in the year of our Lord one thousand nine hundred and four.

B. F. TAYLOR,
Chief Justice of the Supreme
Court of the State of Florida.

By the chief-justice:

[Seal Supreme Court of the State of Florida.]

Attest: B. B. WILSON,
Clerk Supreme Court, State of Florida.

[Endorsed:] In the Supreme Court of the United States, October term, A. D. 1904. George W. Allen as administrator of the estate of John J. Philbrick, deceased, plaintiff in error *v.* Frank M. Arguimbau, as surviving partner of the copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder and Frank M. Arguimbau, doing business under the firm name and style of Schroeder and Bon, defendant in error. Citation on writ of error. Service of this citation is hereby accepted on behalf of the defendant in error therein named. Horatio Bisbee, counsel for defendant in error.

74 In the Supreme Court of the United States, October Term, A. D. 1904.

GEORGE W. ALLEN, as Administrator of the Estate of John Philbrick, Deceased, Plaintiff in Error,
v.
FRANK M. ARGUIMBAU, as Surviving Partner of the Copartnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm Name and Style of Schroeder & Bon, Defendant in Error.

Now comes the plaintiff in error in the above stated cause and files the following as an assignment of the errors he intends to rely upon in the Supreme Court of the United States on his writ of error prosecuted to the said Supreme Court of the United States in the above stated cause, viz.:

1. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the first plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3397 of the Revised Statutes of the United States.

2. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the second plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff
75 under section 3393 of the Revised Statutes of the United States.

3. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the third plea of the defendant filed on March 24th, 1900, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3390 of the Revised Statutes of the United States.

4. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the fourth plea of the defendant filed on February 2nd, 1903, was properly sustained, and that the said plea

constituted no defense to the suit of the plaintiff under section 3397 of the Revised Statutes of the United States.

5. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the fifth plea of the defendant filed on February 2nd, 1903, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under section 3390 of the Revised Statutes of the United States.

6. That the said supreme court of the State of Florida erred in its final judgment rendered on the 30th day of July, A. D. 1904, affirming the judgment of the circuit court in and for Monroe county, Florida, wherein the said supreme court held and adjudged that the demurrer of the plaintiff to the sixth plea of the defendant filed on February 2nd, 1903, was properly sustained, and that the said plea constituted no defense to the suit of the plaintiff under sec-
76 tian 3390 of the Revised Statutes of the United States.

Wherefore in order that the foregoing assignments of error may be and appear of record, the defendant presents the same to the court and prays that such disposition thereof be made as in accordance with law and the statutes of the United States in such cases made and provided, and the defendant prays a reversal of the judgment in the said cause made and entered by the said court.

HUGH C. MACFARLANE AND
JAMES F. GLEN,
Counsel for Plaintiff in Error.

Endorsed on cover: File No. 19,623. Florida supreme court. Term No. 523. George W. Allen, administrator of the estate of John J. Philbrick, deceased, plaintiff in error, *vs.* Frank M. Arguimbau, as surviving partner of the co-partnership composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, doing business under the firm name and style of Schroeder & Bon. Filed February 1st, 1905. File No. 19,623.

In the Supreme Court of the United States.

GEORGE W. ALLEN, as Administrator, etc.,
Plaintiff in Error,

vs.

FRANK M. ARGUIMBAU, as Surviving Partner, etc.,
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA.

Answer to Motion to Dismiss or Affirm the Jurisdiction.

This was an action upon two promissory notes for twenty-five hundred dollars ($2,500) each, executed to Horace R. Kelly, endorsed by Kelly to the Horace R. Kelly & Company, Limited, and by them endorsed to the plaintiff. Three different sets of pleas were filed to the declaration to which demurrers were successively sustained. One of the defenses presented was that the notes were given in consideration of an agreement on the part of the payee thereof to maintain and operate a cigar factory at Key West, Florida, for the period of three years and that the said payee wholly failed and refused to perform his said agreement, of which

the subsequent endorsees of the notes had notice at the time they received them (Rec., 18).

This plea, of course, does not present a Federal question.

(a) The first three pleas filed March 24th, 1900, allege that these notes were given solely in consideration of the agreement and promise of Horace R. Kelly, the payee, whereby he undertook that cigars should be manufactured at Key West, Florida, and in no other place, according to the terms of a certain contract between himself and the Havanna and Key West Cigar Company, Limited, whereby the latter was to manufacture cigars at its factory in Key West to fill all orders for cigars secured by the Horace R. Kelly Company (a corporation to be formed by the said Horace R. Kelly), and whereby the said cigars were to be moved from the said factory and disposed of contrary to the United States Revenue Laws, each of the three pleas specifying a distinct violation of the laws of the United States, which the performance of the agreement would have involved, and which will hereafter be stated in detail.

These pleas were separately demurred to and the demurrers were sustained, and these rulings were each assigned for error (Rec., 28).

Subsequently on February 2d, 1903, the defendant filed his amended pleas to the declaration and in the fourth, fifth and sixth of such pleas set up the same defenses in substance, coupled with an allegation that at the time of the endorsement each of the endorsees had notice of the contract, which formed the consideration for the notes (Rec., 19, 20, 21). These pleas were in turn demurred to, and the demurrer was sustained, and these rulings also were assigned for error (Rec., 22, 23, 24, 28).

The provisions of the Revised Statute in question are as follows:

Section 3390 requires every manufacturer to "enter daily in a book, the form of which shall be prescribed by the Commissioner of Internal Revenue, an accurate

account of all the articles aforesaid purchased by him, the quality of leaf tobacco, cigars, stems, or cigar boxes of whatever description, manufactured, sold, consumed, or removed for consumption, or sale, or removed from the place of manufacture; and shall, on or before the tenth day of each and every month, furnish to the collector of the district a true and accurate abstract from such book, verified by his oath, of all such purchases, sales and removals made during the month next preceding. In case of refusal or wilful neglect to deliver the inventory or keep the account, or furnish the abstract aforesaid, he shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than three years."

Section 3393 requires every manufacturer to paste on each box a label "on which shall be printed, together with the proprietor's or manufacturer's name, the number of the manufactory, and the district or state in which it is situated, these words: 'Notice:—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned under the penalties of law not to use this box for cigars again.' Every manufacturer of cigars who neglects to affix such label to any box containing cigars made by or for him, or sold or offered for sale by or for him, and every person who removes any such label, so affixed, from any such box, shall be fined fifty dollars for each box in respect to which such offense is committed."

Section 3397 provides that "whenever any cigars are removed from any manufactory or place where cigars are made, without being packed in boxes as required by the provisions of this chapter, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding iron the number of the cigars contained therein, the name of the manufacturer and the number of the district and state * * * or are sold or offered for sale not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above described offenses shall be fined for each such offense, not less than one hundred dollars nor more than two years."

Section 3397 further provides for the punishment of any person "who removes from the place of manufacture any cigars not properly boxed and stamped as required by law" by fine not less than one hundred

dollars and not more than one thousand dollars and imprisonment not less than six months and not more than three years, and declares the offense a felony.

The defendant claimed that a right construction of these sections or the revised statutes invalidated these notes, and the decisions of the State Court was against the immunity from liability so claimed.

There are many decisions in this Court which sustain the jurisdiction in this case, and it will be sufficient to cite a few of them in which the analogy is perfect.

Dubuque & Sioux City R. R. Co. vs. Richmond, 15 Wallace, 3.
Railway Co. vs. Renicke, 102 U. S., 180.
Anderson vs. Carkins, 135 U. S., 483.
McCormick vs. Bank, 165 U. S. Text, 545, 546.

In 1895 a constitutional amendment was adopted in Florida for the purpose of relieving the congested condition of the docket of the Supreme Court, the effect of which was to dispense with the necessity of opinions, and ever since its adoption it has been the practice of the Court to render no opinion in cases of affirmance, hence no opinion accompanies the record in this case.

But the record conclusively shows that the Federal question was passed on by the Supreme Court of Florida, and upon the merits.

This question is raised by the first, second and third amended pleas filed March 24th, 1900, and by the fourth, fifth and sixth amended pleas filed February 2d, 1903 (Rec., 9, 10, 19, 20, 21).

These pleas were demurred to on grounds which made it absolutely necessary for the Court to determine the effect of the Federal Statute on the subject matter of this action. The pleas and the grounds of demurrer were such that it was impossible for the Court to have given judgment except upon the merits of the question presented.

See the demurrers and judgments therein (Rec., 15, 16, 17, 18, 22, 23).

Also the assignments of error, predicated on these rulings (Rec., 28).

The record likewise contains a certificate of the Chief Justice in the following terms (Printed Transcript, p. 38).

"And the judgment of the Supreme Court of the State of Florida upon which the said Writ of Error is prayed in the several respects in which the same is questioned by the said assignment of errors, having denied to the plaintiff in error the validity of a defense or defenses asserted by him under the laws of the United States of America, and the said judgment of the Supreme Court of the State of Florida, in the several respects in which the same is questioned by the said Assignment of Error having proceeded on the *sole* ground that the respective defenses as pleaded—Asserted by the plaintiff in error under the laws of the United States of America should be denied and overruled, and the said judgment of the Supreme Court of Florida having denied to the plaintiff in error a title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America, it is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment of the said Supreme Court of the State of Florida," &c.

While this certificate could not give jurisdiction to this Court, it may be resorted to, in the absence of an opinion, to show that a Federal question, otherwise presented in the record, was actually passed upon by the Court.

Gulf, &c., R. Co. vs. Hewes, 183 U. S., 66.

(*b*) With respect to the criticism leveled at the form of the assignment of errors in the State Court, which merely asserted error in sustaining the respective demurrers to the respective pleas, we desire to state that this form of assignment is the one invariably used in

Florida and always deemed sufficient by the Supreme Court of the State.

Little vs. Bradley, 43 Florida Text, 407.
F. C. & P. R. Co. vs. Ashmore, 43 Florida Text, 276, *et seq.*
L. & N. R. Co. vs. Gibson, 43 Florida, 415.

Presumably, however, it would be sufficient under the most technical practice to assign as error that the Court erred in *sustaining* a demurrer to a plea, thereby adjudicating that the plea constituted no defense to the action.

The purpose of assignments of error is to specify the errors committed, and it is highly improper to make the assignments of error serve the purpose of a brief, by incorporating into them the *reasons* or arguments which support the sufficiency of the objections made to the rulings specified as error.

Atchison, &c., R. R. Co. vs. Myers, 22 C. C. A., 268; s. c., 76 Fed. Rep., 443.

The Merits.

(a) Concisely expressed, the substance of each plea was that the consideration for the notes was the payee's undertaking that cigars should be manufactured in accordance with a certain contract, violating certain provisions of the Federal statutes, to be entered into between Horace R. Kelly & Company and the Havana and Key West Cigar Company, Limited. In its last analysis, the undertaking was that cigars should be manufactured in violation of law, viz., in accordance with an agreement which violated the law.

This contract, if carried out, would have violated the express provisions of the law. It would have embarrassed the Revenue officers in collecting the public revenue, and would probably have defeated the collection of lawful taxes due the Government. Such would have been the natural tendency of the performance of

the contract, and the parties are presumed to have intended the natural effect of their proposed acts.

The demurrer confesses the purpose to perform the acts specified, and it likewise confesses the *intent* to accomplish the illegal object which was the natural effect of performing the acts in question.

Bank of U. S. vs. Owen, 2 Peters, Text 527.

This contract contemplated a continuous violation of the Revised Statutes, and in determining the effect of such a contract, we set out with a presumption against its validity.

"When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Harris vs. Runnels, 12 Howard, Text 84.
Miller vs. Ammon 145 U. S., Text 426, 427.
In re Pittock, 2 Sawyer, 416.
15 Amer. & Eng. Ency. of Law, 939.

In many cases this presumption is rebutted by some circumstance which indicates a contrary intent, but there is nothing of the kind in this instance. On the contrary, an examination of the statute *confirms the presumption*. Thus, the penalties are recurrent in each case, which is indicative of an intent to avoid all contracts in derogation of the statute.

Anson on Contracts, 286.
Benjamin on Sales, 528 (Bennet's Ed.).
Clark on Contracts, 387.

Section 3397 provides that a failure to comply with the provisions of that section shall constitute a felony.

This, too, indicates an intent to nullify all acts or contracts which contemplate the breach of the statute, and the possible degradation of a citizen to the condition of a felon.

Anderson vs. Carkins, 135 U. S., Text 489.
Haggerty vs. St. L., Ice Mfg. Co., 143 Mo., 238.

"Agreements, obligations and securities given as the price for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty are deemed incapable of enforcement."

Merchants Ins. Co. vs. Addison and others, 9 Robinson, 490.

In Youngblood vs. Bermingham Trust & Savings Co., 95 Alabama, 524, that Court said: "No rights can spring from or be rested on an act in the performance of which a criminal penalty is incurred and all contracts which are made in violation of a penal statute are as absolutely void as if the law had in so many words declared them to be so."

See, also,

Executors of Cambioso vs. Assignee of Maffett, 2 Washington C. C. Repts., 103.
15 Am. & Eng. Ency. of Law, 939.

In the case of Creekmore vs. Chetwood, 70 Kentucky, 317, it was held that there could be no recovery on a note given in consideration of the sale of a barrel of liquor, which was made in Tennessee and smuggled into Kentucky by the plaintiff in violation of the revenue laws of the United States; and that the brandy not having been inspected nor any tax having been paid thereon; and the barrels containing it not having been branded as required by law, the contract was against public policy and void.

There is at least one case in which it was held that the penalty is a species of license money, and that the exaction thereof satisfied the statute.

Hill vs. Smith, 1 Morr. (Iowa), 70.

A doctrine which would convert all such prohibitory statutes into regulations for commuting the right of offending into money, to use the language of a learned author.

It is apparent that Congress never intended to apply this principle to section 3397, since every box of cigars which is not marked or branded as required

by law is to be forfeited and every such offense is punishable by imprisonment.

As related to this branch of the subject we quote the language of Mr. Bishop, quoted with approval in Gibbs vs. Baltimore Gas Co., 130 U. S., Text 410:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids, nor can it give effect to any agreement, the making whereof was an act violating the law. So that in short, all stipulations to overturn or in evasion of what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the Courts have defined; all made to promote what a statute has declared to be wrong are void."

Bishop on Contracts, Sect. 549.
Gibbs vs. Baltimore Gas Co., 130 U. S., Text 410.

There can be no doubt the statute avoided the contract which was the consideration for these notes.

Miller vs. Ammon, 145 U. S., 421.
Bank of U. S. vs. Owen, 2 Peters, 527.
Church vs. Proctor, 66 Fed. Rep., 240.

The execution of the notes makes no difference, the consideration therefor being tainted with illegality.

Brinn vs. Tarkington, 3 Wall., 377.
Embry vs. Jennison, 131 U. S., 336.
Pollock on Contracts, 327.
11 Chitty on Contracts, 972.

(b) The defendant having impeached the consideration of the notes by plea, the Florida practice required the plaintiff to offer in evidence the agreement out of which the notes grew and which is set up in the pleas. And, unless that contract disclosed that there was a

legal consideration for the notes, the defendant could not recover.

Smith vs. Le Vesque, 25 Fla., 464.

And the plaintiff would not be permitted to refer to that portion of the contract which contained legal provisions and ask the Court to close its eyes to the illegal parts.

McMullen vs. Hoffman, 174 U. S. Text, 656.

The contract between Kelly, the payee of the notes, and the makers was that he would procure cigars to be manufactured at Key West in accordance with the terms of a certain other contract, which provided for a violation of the revenue laws. It was an agreement entered into for the purpose of carrying into effect, or assisting in the execution of an illegal contract, and was void.

"Where a contract grows out of, or is connected with, an illegal act, the Court will not lend its aid to enforce it, and if it be in fact connected with the illegal transaction, it is tainted with the illegality of the transaction from which it sprung."

Barton vs. Port Jackson, &c., Co., 17 Barbour, 397.
Armstrong vs. Toler, 11 Wheaton, 258.
DeWitt vs. Brisbone, 16 N. Y., 508.
Gray vs. Hook, 4 N. Y., 449.

Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract, and render it illegal.

15 Am. & Eng. Ency., 992,
De Bignis vs. Armistead, 10 Bing., 107.
Aubert vs. Maze, 2 B. & P., 371.

And the rule has been broadly laid down that if the connection between the original illegal contract and the new contract can be traced, if the latter is con-

nected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating the void promise cannot give validity to it.

Comstock vs. Draper, 1 Mich., 481; 53 Amer. Decis., 78.
Wheeler vs. Russell, 17 Mass., 258.

It is argued that the chief inducement to the execution of the notes was the *manufacture* of the cigars at Key West, and that the makers of the notes were not concerned with that part of the contract which provided that the cigars when manufactured should be disposed of contrary to the revenue laws.

But the defense is allowed for the sake of the vindication of the law, and not for the defendant's benefit.

Myers vs. Meinrath, 101 Mass., 366.

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. * * *

"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation."

Oscanyan vs. Arms Co., 103 U. S., 268.

"In cases of this kind the maxim is *Potior est Conditio defendentis.*"

McMullen vs. Hoffman, 174 U. S., 654.

Kelly, the payee of the note, was not content to contract merely for the manufacture of cigars at Key West, but to procure them to be manufactured in accordance with the terms of a certain other contract which he had theretofore entered into. The Court cannot, therefore, discard terms which Kelly insisted upon going into the contract, and the use to be made of these cigars after they were manufactured must be

taken into consideration, and it is that illegal purpose, encouraged and assisted by the execution of these notes, that renders them void.

"Where it is part of the contract that an unlawful object was intended, and part of the common purpose that the contract, and the things done under it should be used to promote an unlawful purpose, such contract cannot be enforced."

Materne vs. Horwitz, 50 N. Y. Superior Court.
Reports 41, Affirmed in 101 N. Y., 469.
Church vs. Proctor, 66 Fed. Rep., 245 (Circt. Ct. Appeals, 1st Cir.).

"If the subject matter or object of an agreement is such that its performance would consist in an act or omission so forbidden (by law), or be so connected therewith as to be in substance part of the same transaction, the Courts will not enforce it."

Clark on Contracts, 256.

The demurrers admitted that the sole consideration for the notes was the payee's promise to organize a corporation to contract for the manufacture of cigars in violation of the federal statutes, and this promise, on the present record, is certainly entire and inseparable. The Court cannot separate it into distinct separable elements, legal and illegal, upon the admissions of the demurrers, whatever it might be able to do, if an issue had been raised, and the entire evidence brought before the Court.

The following would be an analogous case. Suppose a tobacco famine had occurred in Key West. A approaches B., a cigar manufacturer, and says that if the latter will give the former his note to assist in raising funds, the former will procure a contract to be made between C and D whereby D shall smuggle tobacco to Key West. Could any one contend that payment of the note could be enforced? And the analogy is perfect between the cases.

Even if it were true that the defendant's intestate

received the same benefit, as the defendant in error contends, it would make no difference.

McMullen vs. Hoffman, 174 U. S., 639.
Wheeler vs. Russell, 17 Mass., 258.
Daniels v. Barney, 22 Ind., 207.
Dudley v. Collier, 6 So. Rep., 394.
Dillon vs. Allen, 46 Iowa, 299.

(*c*) The law must be applied so as to obtain a mutuality of remedies. No action could be maintained against Kelly for a failure to carry out his contract, since he promised to do what was unlawful.

Clark on Contracts, 255, 256.
Mitchell vs. Smith, 1 Binnie, 117.
Church vs. Proctor, 66 Fed., 244.
Materne vs. Horwitz, 101 N. Y., 471.

And consequently neither Kelly nor his endorsees can maintain an action on the notes.

"The remedies must be mutual or not at all."

Mitchell vs. Smith, 1 Binnie, 117.

(*d*) It is suggested by counsel for the defendant in error that the doctrine of *mala in se* or *mala prohibita* has an application here.

Chancellor KENT has this to say about that doctrine:

"The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law in either case is equally unlawful, and equally a breach of duty; and no agreement founded on the contemplation of either class of offences, will be enforced at law or in equity."

1 Kent's Com., 519 (7th ed.).
U. S. Bank vs. Owens, 2 Peters, 527.
Binsley vs. Bignold, 5 Barn. & Ald., 341.
Pratt vs. Short. 79 N. Y., 445.

"Every moral man is as much bound to obey the civil law of the land as the law of nature."

ROOKE, J., in Aubert vs. Maze, 2 Bos. & Pull. Text, 375.

Nor is there any different rule in the case of Revenue Statutes from what controls in other cases.

Harris vs. Runnels, 12 Howard, 84.
Cope vs. Rowlands, 2 m. & W., 157.
Smith vs. Mowhood, 14 M. & W., 461.

The motion to dismiss or affirm should be denied.

Respectfully submitted,

MACFARLANE & GLEN,
RICHARD H. LIGGETT,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

George W. Allen, as Administrator of John J. Philbrick, deceased,
Plaintiff-in-Error.
vs.
Frank M. Arguimbau, as surviving partner of the firm of Schroeder & Bon,
Defendant-in-Error.

No. 523.

MOTION TO DISMISS THE WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA, OR TO AFFIRM THE JUDGMENT.

Comes now the defendant in error, by Bisbee & Bedell his attorneys, and moves to dismiss the writ of error on the ground: that the Court has not jurisdiction of this action on said writ, because no Federal question is presented under Section 709 of the Revised Statutes, as shown by the Record.

2nd. If said motion is denied, then defendant moves that the judgment be affirmed on the ground that the writ of error was sued out for delay, and the question on which the jurisdiction depends is so frivolous as not to need further argument. Said motions will be submitted the 3rd Monday in March A.D. 1906. BISBEE & BEDELL,
for Deft. in Error.

Copy of above motions and of brief in support thereof, received this 27th day of Feby. A. D. 1905.

(Signed) Hugh C. Macfarlane
James F. Glen
Counsel for Plaintiff in error

IN THE SUPREME COURT OF THE UNITED STATES.

George W. Allen, as Adm'r of the Estate of John J. Philbrick,
Plaintiff-in-Error,
vs.
Frank M. Arguimbau, Surviving Partner, etc.,
Defendant-in-Error.

No. 523.

ON WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA.

Brief on motion of defendant in error to dismiss for want of jurisdiction, or to affirm on the ground that the questions raised on the merits are frivolous.

STATEMENT.

Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, as partners under the firm name of Schroeder & Bon, brought an action at law in the Circuit Court, State of Florida against the administrator of John J. Philbrick, deceased, on the latter's liability as one of three joint and several makers of two promissory notes for $2500. each.

See Notes, Rec. p 2.

One Herman L. Stricker was the first administrator

of said Philbrick's estate and was duly succeeded by plaintiff in error George W. Allen.
Rec. p 4.

Pending the action all the plaintiffs died except Frank M. Arguimbau, who, as surviving partner, prosecuted the action to final judgment, which on writ of error was affirmed by the Supreme Court of Florida; to reverse which judgment this writ of error to the said Supreme Court is prosecuted.

We shall designate in argument the plaintiff in error as defendant and the defendant in error as the plaintiff, as they stood in the court of original jurisdiction.

Pending the action, the defendant filed numerous pleas attempting to set up a *failure of consideration* of the two promissory notes sued on, all of which pleas were held bad on demurrer. There is no pretence that any of the *said pleas raised a federal question* and consequently are not before this court for consideration.

But, pending the action, the defendant on March 24th, 1900 filed amended pleas Nos. 1, 2, and 3, attempting to set up that the *notes sued on were wholly void* on the ground that the consideration of the notes *was an independent contract* on the part of Horace R. Kelly, the payee, and that in the performance of *that contract* is was contemplated that an Act of Congress would be violated. Demurrer to each of these pleas was sustained. These three pleas are found on pp. 9 to 12 of the Rec.

(NOTE.—On January 25th, 1900, the defendant filed three pleas of which those numbered 2 and 3 *attempted to set up* that the notes sued on were void, for similar reasons stated in the subsequent three pleas of March 24th, 1900. Rec. pp. 5 to 7. But no errers were assigned in the Supreme Court of Florida for sustain-

ing the demurrer to the said *two* pleas of January 25th, 1900, and cannot be considered here.)

FEDERAL ELEMENT.

Defendant, (plaintiff in error), claims that there was a federal element involved in each one of the three pleas filed March 24th, 1900, which confers jurisdiction on this court.

Error is assigned in *this* court for sustaining the demurrer to each of said three pleas; Rec. 36, and the first of said pleas are in the words and figures following to wit:

"And now comes the defendant, by his attorneys, G. Bowne Patterson and Macfarlane & Shackleford, and files these his amended pleas, and for a further plea says that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, *claiming to be a manufacturer of cigars*, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof he, the said Horace R. Kelly, *would have cigars manufactured in Key West, Florida, and in no other place*, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a *contract between the said Horace R. Kelly and one Max T. Rosen*, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and other to organize a company under the laws of the State of West Virginia to be known as the Horace R. Kelly Company; that the said

Horace R. Kelly Company, when so formed, *was to enter into an agreement* with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. *And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the* president of the Havana & Key West Cigar Copmnay, Limited, *that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited at its factory at Key West, Florida, to fill the orders for cigars secured by the said Horace R. Kelly Company were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented,* burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract *and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen,* president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes and that there should be stamped, indented, burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the non-compliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises *and understandings and agreements aforesaid*

and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to vertify."

Rec. p. 9.

Defendant relies upon this plea as presenting a federal question. It was demurred to and demurrer sustained by the State Courts'.

See Demurrer, Rec. p. 15, latter part.

If such plea presents a federal question, it must arise from that part of Section 709 of the R. S. which reads as follows: *"or where any title, right, privilege* x x x *is claimed under* x x x *any Statute of the United States, and the decision is against the title, right privilege* x x x *specially set up or claimed."*

Let the contention that this plea presented a federal question be tested by well established principles. If the Supreme Court of the State did not *necessarily decide a federal question,* but could have rested its judgment on some ground independent of such question, *then this court has no jurisdiction.*

1st. The State Supreme Court *was not obliged to decide* that the notes sued on were void upon the facts stated in the plea, for the reason that there was no *assignment of error* in due form on the sustaining the demurrer to the plea by the Circuit Court.

The only assignment of error is as follows, to-wit:—"3rd: that the court erred in sustaining plaintiffs' demurrer to defendants' first plea, filed on March 24th, 1900."

Rec. p. 28.

No ground whatever is stated in this assignment, *pointing out wherein an error was committed.*

The grounds of the demurrer to this plea as well

as to three other pleas filed March 24th, 1900 are on p. 16 of the Record, and in the words following to-wit:—

"And plaintiff demurs severally to each of the four pleas filed by Allen as administrator of the estate of John J. Philbrick on March 24th, 1900 on the following grounds:

1st. *Because neither of said pleas state facts constituting any defense.*

2nd. Because the real consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, *and no one of said pleas alleges a breach of said promise.*

3rd. No one of said pleas avers that the alleged proposed contract between the two companies in said pleas stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder.

4th. *That if cigars were manufactured in Key West, under the said contract between the said two companies in the said pleas stated, the defendant and his intestate derived the same benefit and received the same consideration for the said notes, whether said contract was legal or illegal."*

Rec. 16, top.

The Supreme Court of Florida was not *obliged to consider* this assignment of error, it specified no *error* and *was too general and vague to be considered.*

"An alleged error will not be considered by the Appellate Court unless it is specifically pointed out."

Newberry v. State, 26th Fla. 334, Syl. No. 3.

The State Court gave none but a per curiam opinion in the following words:—

Per Curiam:

This cause coming on for final hearing upon the transcript of the record and briefs of the respective parties, and having been duly considered by division A, and no error being made to appear, it is, therefore, considered, ordered and adjudged by the court that the judgment of the circuit court, to review which this writ of error was prosecuted, be and the same is hereby affirmed at the cost of the plaintiff in error.

Rec. p. 32.

If "the case may have been decided *on the form of the remedy* which the practice in the State Court required the plaintiff to adopt, or on the technical insufficiency of the pleadings" this court has no jurisdiction.

Commercial Bank vs. Rochester 15. Wall 639-642.

We therefore submit that it was not necessary for the State Court to pass upon the supposed federal question for the reason *that it was not* raised or specified in the assignment of error, which was so defective that the court was not obliged to consider it at all. The assignment specifies no particular error. It merely alleges error in the most general way in sustaining a demurrer based *on four grounds*. For a like reason, writ of error was dismissed in Harding vs. Illinois, in Advanced Sheets S. C. Reptr. Feb. 1, 1905, which controls the present case.

2nd. The State Court might have decided that the plea as drawn did not call for a decision, whether or not the notes were void, because that question was not before it.

The plea in question set forth above and on p. 9 of the Record avers: (a) "that Horace R. Kelly (the payee) would have cigars manufactured in Key West, Florida and in no other place." (b) "that he would have the cigars manufactured *"according to the*

terms of his contract with the Havana & Key West Cigar Company, Limited: (c) that the *said contract referred to was a contract* between the said Horace R. Kelly and one Max Rosen," and that in *said contract*, Kelly bound himself to have Horace R. Kelly Company *Limited* dissolved, and to create under the laws of West Virginia *a new Company to be known as* the Horace R. Kelly Company (the Limited omitted), and when said new Company was formed, *it was to enter into an agreement* with the Havana & Key West Cigar Company Limited, whereby *it*—the latter Company,—*was in its factory* at Key West, Florida to manufacture cigars and *to fill all orders for cigars secured* by the said Horace R. Kelly Company. Up to this *point* in the plea, it purports to state and set forth *what* Kelly *had agreed to do in his contract with* Max T. Rosen, which contract was fairly presumed, and is to be presumed *to be in writing*.

Up to this point in the plea *there is no pretence that* Kelly or any person intended to violate any Act of Congress.

The next averment in the plea is as follows:

"And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen"—that cigars when manufactured, were to be removed from the factory in violation of an *Act of Congress*. But, it is not averred in the plea that *such understanding and agreement was any part of the contract* between Kelly and Rosen. The fair inference from the plea, (construed most strongly against the pleader), that such understanding and agreement (that the Statute was to be violated) was an oral *one* between Kelly and Rosen; and consequently the plea was bad on the ground that it could not be proven without admitting oral evidence *to vary, by inserting into* a written contract, new terms and provisions. This made the plea demurrable without considering the plea from any other point of view.

Solary v. Stultz, 22 Fla., 263, Syl. 3—and p. 268.

It was proper therefore for the State Supreme Court to decide that as the *part of the plea* setting up an intention in the future to violate a Statute *could not be legally proven, it was not necessary* for it to decide whether the alleged illegal part of a contract *made the notes void or not.* (The fact was that the State Circuit Court had the written contract between Kelly and Rosen before it as a part of the files of the case, *and that such contract did not contain* the above alleged intention that an Act of Congress should be violated.)

3rd. This court is without jurisdiction for the further reason that the plea does *not set up any peronal right, or personal right of property* under any Act of Congress, but sets up a right of a third party to-wit: the United States to have the Revenue laws enforced. This proposition is maintained in the following cases:

Hale v. Gaines, 22 How.., 160.
Austin v. Anderson, 7th Wall. 694.
6th Rose's Notes, 1066.
Long v. Converse, 91 U. S., 114.
Cl ade v. York, 168 U. S. 648.

"Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject in litigation."

Hale v. Gaines, 22 How, 160.

"Under the 25th Section of the Judiciary Act it is not every misconstruction of an act of Congress, which can be re-examined: *the decision must have been against some right &c. so claimed under such act."*

Montgomery v. Hernandez, 12 Wheaton, 129.

But at bar it is obvious that there was no controversy over the *construction* of any Act of Congress, and the State Court was not called upon to consider any.

The *personal right* of the makers of the notes under the payees promise was to have cigars made in Key West. But this right was derived wholly from Kelly's said promise, contained in his contract to that effect with the maker of the notes. No part of this right was acquired under any federal Statute, nor is there any claim in the plea that the State Court *denied this right* of the defendant.

This right to have Kelly have cigars made existed if there had been no federal statute regulating the mode and manner of boxing and stamping *before* removed from the factory.

It is idle to contend that the makers of the notes had *any right* within the meaning of that word in Section 709 of the R. S. to have the cigars *after they were manufactured*, packed in boxes, &c. in compliance with the statute.

This was *the right* of the United States and the makers of the notes did not possess such right to any greater extent than any other citizen of the 80,000,000 of citizens of the United States. Nor did the makers of the notes possess any right that the Statute should not be violated, not possessed by every other citizen.

Indeed,—Kelly, the payee, had performed his promise, the consideration of the notes, by *having cigars manufactured*. He was not bound by his promise as stated in the *plea, to ever pack the cigars in boxes of any kind*, nor to remove them from the factory in which they were made, nor to sell them. His contract was not to manufacture *and sell* but to manufacture. The plea

does not state *how long* Kelly was to make cigars nor how many he was to make, consequently if he made cigars for *one month, one week,* or *one day,* he performed his promise *as stated in the plea,* to have cigars made and the consideration for the notes was complete, even though the performance of his promise, and not the promise itself, was the consideration of the notes.

The amount of the consideration is immaterial; certainly so, *on the* question of jurisdiction.

But, it is a settled rule of law that where the consideration of a promissory note is *an independent executory contract* of the payee to be performed in the future, *both made at the same time, the promise in the contract* to perform, and not the performance, is the consideration of the notes. The makers must pay their notes, and if the payee breaches his promise they must sue him for damages for the breach.

6th Vol. (2 Ed.) Enc. of Law, 785-
Turner v. Rogers, 121 Mass.
Waterhouse v. Kendall, 11th Cush., 128-167.
Arthur v. Hart, 17th How., 6-16.

The State Court could well have decided that the *only right* the makers of the notes possessed was *Kelly's promise* to make cigars, that this was not derived from any Act of Congress. That the defendant cannot invoke a contemplated violation of a Statute, *regulating* the boxing of cigars, as making Kelly's entire contract void or illegal, and thereby claim a *right* under an Act of Congress, is settled.

What the defendant complains of is that a *fraud on the Revenue laws of the United States was intended* by violating them, and that the maker of the notes *had a right under such laws to have them obeyed. If such* fraud was intended, it is not alleged that the makers of the notes *knew it* when they signed the notes, and they were not parties to it. They cannot be heard to

complain, especially after presumably Kelly's contract to make cigars has been performed.

The following are the Sections of the Revised Statutes regulating the business of manufacture of cigars specified in the assignments of errors in this court. They were not specified at all in the Supreme Court of Florida.

Section 3390 requires every manufacturer to "enter daily in a book, the form of which shall be prescribed by the Commissioner of Internal Revenue, an accurate account of all the articles aforesaid purchased by him, the quality of leaf tobacco, cigars, stems, or cigar boxes of whatever description, manufactured, sold, consumed, or removed for consumption, or sale, or removed from the place of manufacture; and shall, on or before the tenth day of each and every month, furnish to the collector of the district, a true and accurate abstract from such book, verified by his oath, of all such purchases, sales and removals made during the month next preceding. In case of refusal or wilful neglect to deliver the inventory or keep the account, or furnish the abstract aforesaid, he shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than three years."

Section 3393 requires every manufacturer to paste on each box a label "on which shall be printed, together with the proprietor's or manufacturer's name, the number of the manufactory, and the district or state in which it is situated, these words: 'Notice:—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned under the penalties of law not to use this box for cigars again.' Every manufacturer of cigars who neglects

to affix such label to any box containing cigars made by *or for him*, or sold or offered for sale by or for him, and every person who removes any such label, so affixed, from any such box, shall be fined fifty dollars *for each box* in respect to which such offense is committed."

Section 3397 provides that "whenever any cigars are removed from, any manufactory, or place where cigars are made, without being packed in boxes as required by the provisions of this chapter, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding-iron the number of the cigars contained therein, *the name of the manufacturer* and the number of the district and state. . . . . or are sold or offered for sale not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above described offenses shall be fined for each such offense, not less than one hundred dollars nor more than two years."

Section 3397 further provides for the punishment of any person "who removes from the place of manufacture any cigars not properly boxed and tsamped as required by law" by fine not less than one hundred dollars and not more than one thousand dollars and imprisonment not less than six months and not more than three years, and declares the offense a felony.

And said Section 3397 is the Section which is mentioned in the first assignment, Rec. 36.

In Udell v. Davidson, 7th How. 769, the syllabus reads as follows: "A defense founded on the allegation "that the defendants' "*conduct* was in fraud of an Act "of Congress, is not a matter which this court can ex- "amine *at his instance* on a writ of error, under the 25th "Section of the Judiciary Act of 1789." Much less

where there is an unexecuted intention of a *third* party to commit fraud.

In the case at bar, the plea *does not even allege that any fraud of or violation* of an Act of Congress was *actually committed but only contemplated.* Indeed the plea does not aver that the contemplated contract between the *two corporations was ever made.*

So that in the final analysis, the defendant in his plea only sets up *a right* that *two third parties should not intend to make a contract in the future which if made, and subsequently performed* might be a fraud on the Revenue laws.

In Walworth v. Kneeland, 15 How. 348, the syllabus reads as follows:—"Under the 25th Section of the "Judiciary Act of 1789, a party cannot come to this "court because a State Court has refused *to allow his defense that the contract sued on* was made by him and "the plaintiff in fraud of an Act of Congress. This is "not *a right or title* under an Act of Congress, within the "meaning of the 25th Section."

Cited, approved and applied in Conde v. York, 168 U. S. 642: in Railroad Co. v. Morgan, 160 U. S. 288, and in Railroad Co. v. Fitzgerald, 160 U. S. 557.

Gill v. Oliver's Executors, 11th How. 529, is peculiarly applicable.

The mere *abstract right,* if any, in the makers of the notes to have the Federal Statute complied with *without alleging any injury to them,* is unimportant, and a *moot question.*

Hooker vs. Burr, 194, U. S. 419.

Again: The Record discloses that even if the makers of the notes could raise the question of the

contemplated fraud on the Statute, the decision of the State Court could legally be based on the ground that the promise of Kelly to make cigars was the consideration of the notes; that *such promise was legal;* and that the *contemplated future fraud* on the Statutes was too remote from such promise to make the latter illegal.

In Dibble v. Bellingham Bay Land Co., 163 U. S., 69, the court said:—

"If the record discloses that a question has been "raised and decided adversely to a party claiming the "benefit of a provision of the Constitution of the United "States, and another question not Federal has also been "raised and decided against such party, and the decision "of the latter question is sufficient notwithstanding the "Federal question to sustain the decision, this court will "not review the judgment.

Eustis v. Bolles, 150 U. S. 361-366.

"If it appears that the court did in fact base its "judgment on such independent ground, or, where it "does not appear on which of the two grounds the judg- "ment was based, if the independent ground on which it "might have been based was a good and valid one, "sufficient in itself to sustain the judgment, this court "will not assume jurisdiction.

Klinger v. Missouri, 13 Wall. 257."

And it is not to be overlooked that this plea does not purport to be one of *failure* of consideration, but is a plea claiming upon the facts stated in it that the notes sued on *were wholly void ab initio.* Because a *non-compliance* with a Federal Statute, was intended.

But the general rule is that though the promise of the payee in an independent contract, or the act to be done as the consideration of a promissory note, is a violation of an Act of Congress, still the note is not

void, unless the Act of Congress *expressly declares the note void*, which is not this case.

Tiedeman on Commercial Paper, Sec. 280. Id. Sec. 178.
21st Wall., 241-248.
2nd Ed., Vol. 4th Enc. of Law, 191-192.

And this is especially so where *the alleged violated provisions* of the Statute are only *regulations for the purpose of collecting taxes and revenues.*

Harris v. Rummels, 12, How. p. 79 and cases therein cited.
5th Vol. Rose's Notes, p. 70.

In such case no one can raise the question but the United States.

Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240-250.

Again: it is well settled that *"an obligation sued on will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."*

Armstrong v. Bank, 133 U. S. 467.
Armstrong vs. Toler, 11th Wheat., 258.

Here the consideration of the notes, independent of the alleged intended violation of the Statute as to packing and removing from the factory, was Kelly's *promise to have cigars manufactured.* This was wholly disconnected from Kelly's duty to see that the cigars *after they were made* were boxed and stamped according to the Statute. Besides from anything that appears in the plea, neither Kelly nor the Horace R. Kelly Company ever removed any cigars not packed and stamped according to law, or violated any statute in any respect.

The plea does not so allege. The presumption is that the Statutes in question were complied with, in the absence of any *averment* to the contrary, even though in the alleged contract between The Horace R. Kelly Co., and The Havana & Key West Cigar Co., their violation was contemplated. Besides, the plea does not aver whether any cigars were made or not *but it is presumed they were,* for every man is presumed to have done his duty under a contract. And assuming that Kelly's contract was performed, the makers of the notes after such performance, *and after receiving the consideration expected,* cannot plead as a defense that such contract was illegal or void.

Brooks v. Martin, 2 Wall. 70-71, *where the contract was declared void by the Statute.*
Kimbro v. Burdett 22 How., 256.
11th Wheaton, 258.
2nd Vol. Rose's Notes, 482.

4th. As defendant in the view of the case that Kelly's contract *was performed,* could not plead *any illegality in the contract,* as a defense, the State Court may have and could properly have rested its decision sustaining a demurr to the plea on the distinct ground that defendant after performance could not raise the question of the illegal consideration. Such a ruling would be on a question of *general law,* and would not be a *denial* of any *right under* any Federal Statute.

And it is submitted that the asserted federal element was too remote, and has been so often decided that it would now be treated as frivolous, and the motion to affirm the judgment should be granted.

Blythe v. Hickley 180 U. S. 333-338.

The 2nd and 3rd pleas filed March 24th, 1900, Rec. pp. 10-11 are precisely like the 1st plea above discussed,

except that it is alleged in such 2nd and 3rd pleas that some *other provision* or Sections of the Statutes regulating the manufacture of cigars *was to be violated*. Such 2nd and 3rd pleas are bad both as to their raising any federal question and as to their merits, for the same reasons that the 1st plea is bad; and it is unnecessary to repeat our argument.

And the assignment of error for sustaining demurrer to the said 2nd and 3rd pleas is in the same defective form as that on the 1st plea.

See Assignments, Rec. p. 28.

5th. This court has no jurisdiction on the following grounds:

The declaration alleges that Kelly, the payee, at the time the notes were made indorsed the notes to the Horace R. Kelly Co., and the latter Company indorsed them to the plaintiff.

Now, each of these pleas of March 24th, 1900 aver that the *plaintiffs when they took the notes had notice of what* the pleas state as making them void, *but neither of these pleas aver that The Horace R. Kelly Co.*, when it received the notes had notice. Therefore, The Horace R. Kelly Co., not having notice, by its indorsement passed a good title to the plaintiffs, even though the latter had notice.

There is no averment in any of these pleas that the plaintiff *took* the notes *after maturity*. And the declaration avers that these notes were indorsed and passed to the plaintiff at the *time they were made*. p. 2.

The State Court could therefore have placed its decision on the general rule of law that one taking with

notice, from one without notice, has a good title without deciding any other question.

And this illustrates that the notes in the hands of an innocent holder without notice of the alleged illegal contract as their consideration would not be *void* but valid.

Tilden vs. Blair. 21, Wall. 248, and cases cited.

There are therefore abundant grounds upon which the State Court could have placed its judgment sustaining demurrers to these pleas, without deciding any right claimed as a defense that the notes were void, because the contract alleged to be the consideration contemplated that during its performance an Act of Congress was to be violated. Besides such a decision would be *one of general law*. Of this later on.

OTHER PLEAS.

On the 2nd day of February A. D. 1903, the defendant filed six pleas numbered 1 to 6 inclusive.

Rec. p. 18 to 21.

The 4th, 5th and 6th pleas are relied upon as raising a federal question, as asserting to a right of defendant under an Act of Congress, which was denied by the State Court.

See assignments of error in this court p. 36.

To each of these pleas Nos. 4, 5. and 6 a demurrer was sustained.

See grounds of demurrer, Rec.. p. 22 last part.

These pleas are identical in substance with pleas 1, 2, 3, already discussed, save in the following particulars, to-wit:

1st.—The averment in the said 1st, 2nd, and 3rd

pleas above discussed, the clause that it was "understood and agreed" by and between Kelly and Rosen, that in the contract between Horace R. Kelly Co., and The Havana & Key West Cigar Co., there should be a provision as to violating Federal Statutes, is omitted in these pleas, 4th, 5th and 6th, and *it is averred* in the latter pleas that the contract between the two corporations contained in itself the agreement, that in the contract between said corporations Acts of Congress were to be violated. *Thus the objection that a part of the pleas resting in parol and not provable is removed.*

2nd. These pleas 4th, 5th and 6th allege the *consideration of the notes was illegal,* whereas in pleas 1, 2, and 3 above discussed, the notes were alleged to be *void.*

3rd. In pleas 4, 5, 6, it is averred *that The Horace R. Kelly Co.,* as well as plaintiff *when it took the notes had notice, &c.* In all other respects the two sets of pleas are substantially identical.

The 4th of this second set of pleas reads as follows:

4. "And for a further plea to the declaration of the plaintiff the defendant says that the notes sued upon, and each of them, were executed and delivered by the said John J. Philbrick, George W. Allen and C. B. Pendleton to the said Horace R. Kelly solely on the consideration of an agreement and promise of said Horace R. Kelly whereby he undertook that cigars should be manufactured at Key West, Florida, and at no other place, *in accordance with and pursuant* to the terms of a certain contract to be made between Horace R. Kelly and Company, a corporation which he undertook to organize, and the Havana & Key West Cigar Company, Limited, whereby the latter was to manufacture, at its factory in Key West, cigars to fill all orders for

cigars secured by the said Horace R. Kelly & Company, and whereby the said cigars, when so manufactured, were to be removed from the said factory or place where the same were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a legible and durable manner, or in any manner, the number of cigars contained therein and the number of the manufactory in which said cigars had been manufactured, all of which was contrary to law, wherefore the consideration upon which the said notes sued on upon were given was illegal; and the defendant alleges that Horace R. Kelly and Company, Limited, and the original plaintiffs herein, at the time of the indorsement and transfer to them of the notes sued upon, had notice and knowledge of all the matters herein set forth. And this the defendant is ready to verify."

Rec. 19.

Assignment of Error in this court, p. 36 No. 4.

It is obvious that this plea, save in respect to the *three points* of difference with the first set of pleas above pointed out, is subject to all the objections as to presenting a Federal question that the first set of pleas are:

1st. That it does not present a case of any personal right in defendant under an Act of Congress, and a denial of such right by the State Court.

2nd. That Kelly's promise to have cigars manufactured was legal, and this makes a legal consideration independent of and without relying upon the alleged contemplated violation of the Federal Statutes between the two corporations mentioned in the plea: and consequently the notes can be legally enforced.

3rd. That Kelly's contract, the consideration of the notes, having been performed (there is no averment in the plea that it was not), the makers of the notes cannot

defend after performance by setting up that any part of the consideration was illegal.

Such makers cannot have and enjoy the full consideration of having had cigars manufactured and then turn round and say: True it is we had the consideration of having cigars made, but *in the mode* of boxing, stamping, and removing the cigars, or in some other respects, it was intended by third parties in whose factory the cigars were made *to* violate a Federal Statute *after the cigars* were made.

Such contemplated or intended violation of the Statute is too remote from the legal consideration of having cigars manufactured, to affect the legality of the consideration .

The makers of the notes, *playing the role of public benefactors, in an effort to increase business in the City of Key West and its commercial importance,* received precisely the same benefit *from the manufacture of cigars* if they were packed and removed &c., in an illegal manner as they would have received if packed and removed, &c., in strict compliance with the Acts of Congress.

And the conclusion is inevitable from any logical standpoint that these pleas did not present any question of *right under* an Act of Congress, which, the State Court has denied.

The point attempted to be made in the above plea No. 4, is that the *entire consideration was illegal* and *such illegality consists entirely in an intended future non-compliance* with statutory regulations for securing the payment of taxes. Such non-compliance was not to be *by Kelly,* the payee of the notes, but *by the Havana & Key West Cigar Company Limited,* in whose factory the cigars were to be made.

This simply is a contention that a *general rule of law,* to-wit: that illegality in the consideration for a

promissory note renders the note invalid, *should be applied in this action.*

We repeat the plea does not allege that such alleged intention to disobey an Act of Congress was ever consummated, for there is no pretence in the plea that any Act of Congress was *actually violated* by anybody.

It is therefore perfectly consistent with the plea, that the said Company did actually comply with the Statutes in all respects for it certainly would not be long engaged in making cigars before Revenue officers would know that the Statutes were being violated, if in fact they were being violated, and it is to be presumed that when the cigar manufacturer *knew it was* violating the Statutes, it would cease doing so, rather than incur the penalties and forfeitures declared therein. An intention to violate a statute, unaccompanied with any act to that end is *not illegal,* therefore the makers of these notes cannot maintain that the consideration was illegal on the mere averment of an *intention* to violate the Statute, which was never carried into effect by any criminal, or immoral act.

We repeat *the presumption is* that in point of fact, the cigars were manufactured and these Statutes were complied with, especially so as it does not appear that anybody was prosecuted for their violation. If the cigars were not manufactured, then of course no Statute was violated. As the plea does not allege whether or not, Kelly caused any cigars to be made, the averments in the plea rest on no foundation *save the* circumambient air:

Again,—It is not averred in the plea that the Horace R. Kelly Company was ever organized, or that the al-

leged *contemplated contract* between that Company and the Havana Company *was ever made*..

Every fact stated in the plea may be true and yet *it may be true* that Kelly manufactured (or caused cigars to be manufactured), *and that after* they were manufactured all the Federal Statutes respecting such a business were complied with.

The vice of the plea is the assumption that Kelly, by his contract or promise—which was the consideration of the notes, *was bound to violate the Statutes* while making cigars, and that the maker of the notes had the legal right under said contract *to insist that* he should violate or have the corporations violate the Federal laws. And on this theory Kelly's contract was illegal. But *said contract was divisible* into *two distinct* parts: one of such was *between the makers of the notes and Kelly:* by which he agreed to have cigars made in Key West. The other was between Kelly and *a third party, containing alleged stipulations to be effective after the cigars were made,* as to an illegal mode or manner of handling and disposing of the cigars.

The State Court could have properly said, *the mode and manner of doing the thing is merely directory,* and is not of the essence of it, and all the rights of the makers of the notes consisted of having *cigars manufactured at Key West.*

If in their manufacture *one hundred or five hundred* persons were employed, the increase in the business of Key West, which was the object aimed at by the makers, would be the same whether the cigars were legally or illegally packed in boxes, &c. In this view of it, it is absurd to say that the makers of the notes have been *denied any right under an Act of Congress.*

The 5th and 6th pleas of the set filed February 2nd, 1903 are exactly like the 4th, except in the mode and manner in which it is alleged the Statutes were to be violated.

See Pleas, Rec. p. 20.

The assignment of errors upon them are in the same defective form, and the State Court was not bound to notice them.

See Assignments Nos. 7-8, and 9. Rec. p. 28.

6th. The State Court could have properly refused to consider any of these six pleas filed February 2nd, 1903, Rec. p. 18, to 21, on the distinct ground that they are so *utterly inconsistent that proof of the truth of one would establish the falsity of another.* It is true Sec. 1062 R. S. of Fla.,, says: "But it shall be no objection to any plea that it is *contradictory* to any other plea, filed by the same party in the same case."

But allowing contradictory pleas was never intended to permit such a result. The Supreme Court of Washington in Seattle National Bank vs. Jones, 13th Wash. 281, S. C. 48, L. R. A. 177,—dealt with just such a case and ruled such inconsistent pleas not permissible even under a statute allowing inconsistent pleas.

All of said six pleas should have been stricken out. False swearing should not be encouraged.

48 L. R. A. p. 185.

When a statute speaks of allowing contradictory pleas to be filed, it means pleas *inconsistent by implication of law and not such as involve a direct denial of a fact previously pleaded.*

And where pleas are so utterly inconsistent *that*

proof of the truth of one would establish the absolute falsity of the other, they are not admissible.

To require a court to listen to evidence by a defendant *to prove that one of his pleas is absolutely false would make judicial proceedings a farce.* Although, the evidence would prove the truth of an other.

48 L. R. A., 185.

To illustrate, the defendants 3d plea filed February 2d, 1900 p. 19, expressly says that the consideration for the notes sued on was Kelly's promise *to perform a contract* he had previously made with Rosen *"and for no other or further consideration."*

Now, if that plea is true, pleas Nos. 1, 2, 4, 5, 6, filed at same time as the 3d plea are necessarily *absolutely false in fact,* and not by implication of law.

See brief on this subject.

48 L. R. A. p. 188 at seq.

Objection may be raised by motion to strike or demurrer.

See brief, 48 L. R. A. p. 208.

In this view, the State Court should have disregarded such pleas. But the court was right in sustaining a demurrer to them on this ground.

The State Court may have decided and could properly have decided to sustain a demurrer to each of these pleas on the ground that no Act of the Legislature could be so construed as to require a court of justice to try issues so *absolutely inconsistent* (not *merely contradictory, that proof of the truth of one would prove the falseity of another.* If the jury should find one issue, in favor of the defendant, yet he has by another

plea sworn to by him, *admitted on the record that the fact so found is untrue*

7th. The State Court could have rested its judgment upon either the 2nd or 4th grounds of demurrer, without deciding whether the consideration of the *notes were* void as alleged, for the reasons alleged in the plea.

See grounds of Demurrer Rec. p. 22, near bottom.

The plea does *not allege* that the *Payee, Kelly, breached his promise* to have cigars manufactured in Key West, which was the consideration of the notes; and if cigars were manufactured, which the court had a right to assume from the plea, that fact not being denied, the makers of the notes received *a consideration* therefore; and the same consideration they would have received if there had been no pretence of any illegality in the terms of the contract between the *third parties mentioned in the plea.*

SOME FURTHER VIEWS.

8th. The plea presents the proposition that if the plaintiff took the notes before maturity *with notice* of the alleged contract wherein the alleged non-compliance with the statute was contemplated, then he is not an innocent holder, even though he paid full value for the notes.

This is tantamount to a contention that no legal negotiations of the notes could be made at all, because the indorsee and purchasers had notice of the *one fact that, after the cigars were made, a violation of the statute was contemplated.* And this, as contended, made the *whole consideration illegal.*

If this were true, then it would follow that the proceeds of the notes could *never be used* to enable Kelly

to have cigars made,—the sole object of making the notes. It would also follow that *Kelly must breach his promise* to have cigars made, and the notes and Kelly's contract, or promise, to have them made, *must all be regarded as nugatory and void.* Such evidently was not the intent of the parties.

Test the alleged illegality in the consideration as follows: Suppose the makers of the notes after they were negotiated had sued Kelly for damages for a breach of his promise to have cigars made, and Kelly had set up the defense by a plea that his promise was illegal *in that he* had caused a contract to be made between two corporations, by which one of them had agreed with the other to make the cigars in his factory, and that said corporation intended to remove the cigars from his factory, in violation of the statutory regulations.

The answer to such a plea on demurrer thereto, would be:

(a) Kelly was not legally bound by his promise with the makers of the notes to cause such a contract to be made: and the making of such a contract was his own *voluntary* act, and his own voluntary wrong to which the makers were not parties.

(b) If Kelly applied a part of the proceeds of the notes to aid these parties to do an illegal act after applying a part to doing the legal act of making cigars, it was Kelly's voluntary action, to which the makers of the notes were not parties.

(c) It was Kelly's duty under his promise to have cigars legally made, and to conform to all statutory regulations after they were made, so that their manu-

facture should not be interrupted in consequence of such regulations being violated.

(d) Kelly could not enjoy the benefit of the notes and their proceeds, and defeat recovery for the breach of his promise, by taking advantage of his own wrong.

(e) It is a much plainer case than where an illegal contract has been performed,—one party cannot hold the proceeds of performance and not perform his part. The above being true in law, the converse is true, in an action against the makers.

MERITS.

Therefore if a Federal question was involved and necessarily decided by the State Court, it was decided correctly and the judgment should be affiirmed.

And this for some further reasons.

The question thus presented *was a question of general law.* The *right of the makers* to have the consideration declared illegal and the notes invalid, was not any more a different right because the acts contemplated where a violation of a Federal Statute than it would have been if a violation of *a statute of the State* had been contemplated.

The question presented was whether, upon the facts stated in the plea, *the consideration was of such an illegal character as rendered the notes invalid,* and this was plainly a question of general law, in respect to which there may be a conflict of authority dependent upon the *quality of the illegal acts,* whether heinous or trivial in their nature.

If the consideration was illegal it did not become

a Federal question simply because the illegality consisted in an intended violation of a Federal statute, but was a question of general law arising in the case as to which the decision of the Florida Court was final.

The makers of the notes could not possibly have had a right to have the consideration declared illegal, because its illegality consisted of a contemplated violation of a Federal statute, if they would have had no right to have the consideration declared illegal, if its illegality had consisted of a contemplated violation of an act of the English Parliament, of the Legislature of any State.

It is a matter of *public policy of all States and all governments* that contracts based on *illegal considerations* shall not be enforced; and the decision that it is so illegal is based upon general rules of public policy and general rules of law which control such cases. (Hanover v. Doane, 12 Wall. 349) But there is abundant authority that a contract is not necessarily not enforcible simply because in its performance an illegal act was intended.

It depends on the quality and nature of the illegal
12, Wall. 349.

Here the alleged contemplated illegal act was in no proper sense the consideration of the notes, but only an *incident* which was to happen *after the performance of Kelly's promise* to have cigars made. The fact that some statutory regulations were to be violated by the Havana Co. after the cigars were made cannot logically be regarded as *tainting with turpitude or illegality Kelly's promise to have them made.*

The utmost the defendant's contention can amount to is that the defendant made his note to Kelly for the

sole purpose of furnishing him with money,—proceeds of the notes—*to enable him to violate a statute*:—and that so taints the notes sued on with illegality that the law of *public policy* prohibits a recovery thereon.

But, obviously, the case is not within that rule of law.

The primary and dominating intent and purpose of the makers was to provide Kelly with the means of having cigars made in Key West, in order to increase the commerce and business of that city. The makers were acting as public benefactors. The plea *does not allege that when* the notes were made and delivered to Kelly, the makers knew of the contemplated alleged contract *to be made thereafter* in which contract *between two corporations* (one of which was not then organized) the plea avers it was to be provided that a *statutory regulation* should be violated. This being so, there was no moral turpitude attaching to the makers of the notes by which their *consciences could be tainted.* As the plea goes, the consideration for the notes was *Kelly's promise* to have cigars manufactured. If Kelly consented in his contract with Rosen that in a subsequent contract to be made between the two corporations, *one* of such corporations should, after cigars were manufactured, violate such statutory regulations, enacted to secure the collection of taxes, such a consent could hardly amount to a taint of his conscience, or any appreciable or material turpitude on his part. Such consent on his part was a negative or negligible quantity, and wholly immaterial in law. This for the plain reason that *as the plea states* the Havana and Key West Co., were to manufacture the cigars *in its own factory*, and the contemplated violation of the statute *was to be by that Co., over which Kelly could have no control whatever, and for whose action Kelly was not responsible.* If therefore the Statutes

were to be violated as stated in the said plea No. 4 (and in 5 and 6), neither the makers of the notes nor Kelly the payee were parties to, or in any way responsible for the contemplated illegal acts by the said corporation. *Kelly's promise, the consideration for the notes, is still existing and untainted. Not only this, but as soon as Havana &c. Co., commenced to make cigars Kelly's promise to have cigars made has actually been performed.*

In other words, it is plain that Kelly's promise to have cigars made cannot be deemed *to be tainted with any illegality,* simply because the Havana Co., which was to make them intended to violate a statute. Said Co., could violate the statute or refrain from doing so *regardless of Kelly's alleged prior consent.* Thus it is seen that Kelly's promise is not tainted with any actual or intended violation of a statute, or illegal act *by him,* or any for which he could be held morally or legally responsible.

Speculating or theorizing a little further upon this most *unique and extraordinary plea* (apparently fabricated for purposes of delay) there is a still further result.

Obviously, the proceeds of the notes would be applied in renting a factory, buying tobacco, and paying the expenses of manufacture of cigars,—*all legal objects.* If the cigars *were not to be boxed, stamped, &c., no money would be needed in not doing those things, consequently no part of the proceeds of the notes* could possibly have been intended to be used, or could possibly be used to carry out the intent to violate the statutes.

Besides, all the proceeds of the notes being applied as above for legal objects, *more* cigars could be manufactured *than if part* of such proceeds were applied in buying *boxes and stamps &c.* Thus the makers of the notes would actually receive a larger benefit by way of

increased commerce, by the alleged contemplated illegal *acts of omission being done than if not done.*

Consequently, the makers of the notes are not in *position* to set up that the consideration of the notes was illegal.

The case bears no analogy whatever to cases where a defense of illegality of consideration has prevailed.

ANOTHER POINT.

Where the alleged illegality in the consideration consists of acts merely *mala prohibita,* for which a penalty is imposed, *and the acts are not of great moral turpitude,* the contract sued on will be enforced. This distinction is clearly made in the following cases:

Hanover v. Doane, 12 Wall, 342:
Thomas v. Richmond, 12 Wall., 356:
Armstrong v. Toler, 11 Wheat., 258:
Hodgson v. Temple, 5 Taunt., 181:
De Groot v. Van Duzer 20 Wend., 402.

Again, where the alleged illegality of the consideration consists of *Mala prohibita* and not *mala in se,* such as aiding to commit murder or treason, the considera tion is not *necesarily* illegal, and the court will examine the *whole statute to see if the legislature intended that a contract contrary* to the statute should be viod or illegal. Harris v. Rummels 12 How. 79-86, where it was held the contract was not void.

The doctrine of Harris v. Rummels was applied in Gold Mining Co. v. National Bank, 96 U. S. 640, and in National Bank v. Mathews, 98 U. S. 627.

Moreover, in order to invalidate the contract of

Kelly, the makers of the notes *must know that he intended* to violate an Act of Congress. "A mere suspicion or even conviction *without actual knowledge of an intention to violate* law is not sufficient."

Savage v. Mallory, 4 Allen, 492.
Tiedeman on Commercial Paper, Sec. 198, pp. 329-330.

And this is the rule at common law,

Ely v. Webster, 102 Mass. 304-307.
Adams v. Coulliard, 102 Mass. 167.

Besides in the case at bar, it was impossible that any part of the proceeds of the note could be applied to acomplish the illegal act enjoined by statute consisting of *a refusal to do* the act enjoined.

There is no averment in the pleas that neither the makers or Kelly *knew* the proceeds of the notes were to be applied to an illegal purpose. Certainly none that the makers knew it.

So, it will not affect the validity of the paper if the seller did *not know at the time that the intended act was illegal.*

Stone v. Hooker 9th Cowan, 154.
Coventry v. Barton, 17 Johns. 142.

This is not averred.

So it has been held that *"mere knowledge* of the vendor that the goods he is selling are to be used for an illegal purpose, *without his participation in that illegal intention,* will not invalidate a note given for the purchase money."

Tiedeman on Comm. Paper, Sec. 198, p. 328, and case cited in Note 2.
Hodgson v. Temple, 5 Taunt. 181.

But it has already appeared that there was no moral

turpitude in the makers of the notes, or in Kelly upon the facts aleged in the plea. As shown elsewhere, even though performance of Kelly's promise was not the consideration, but its performance was, if he did perform, the makers having received the consideration cannot plead the alleged illegal acts as a defense.

No time is stated in the plea when performance was to commence or end, and, consequently, it is not alleged that any law was in fact violated. And if Kelly's promise has been broken by failure to have cigars made, the makers' remedy is to sue him for the breach, and there is no illegality in his promise which he could set up as a defense. He certainly could not be heard to plead that whilst his promise contained no illegal acts, said corporation did intend to violate a statute.

It is submitted that the question which is relied upon as a right denied under Sec. 709 of the R. S. is one of general law and not a right in plaintiff specially set up under an act of Congress and, that the writ of error, should be dismissed or the judgment affirmed.

(signed) H. Bisbee
Geo. C. Bedell,
Attys for Defendant in error.

Supreme Court of the United States.

No. 523.—October Term, 1904.

George W. Allen, Administrator of the Estate of John J. Philbrick, deceased, Plaintiff in Error,
vs.
Frank M. Arguimbau, as Surviving Partner of the Copartnership composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, doing business under the firm name and style of Schroeder and Bon.

In error to the Supreme Court of the State of Florida.

[May 1, 1905.]

This was an action upon two promissory notes for twenty-five hundred dollars each, payable to Horace R. Kelly, endorsed to the Horace R. Kelly & Company, Limited, and by that company endorsed to the firm of which Arguimbau was survivor.

Many pleas were interposed in defence, and, among them, several filed March 24, 1900, and several filed February 2, 1903. By the first of these pleas, defendant below, plaintiff in error here, averred "that on or about the 18th day of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia, to be known as the Horace R. Kelly Company; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured

by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited, at its factory at Key West, Florida, to fill the orders for cigars secured by the said Horace R. Kelly Company were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a legible and durable manner, the number of cigars contained therein and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen, president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes and that there should be stamped, indented, burned or impressed into each box in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the non-compliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and understandings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to verify."

The second and third pleas were so nearly identical with the first that they need not be set forth. The pleas of February 2, 1903, set up the same defences in substance, coupled with the allegation that at the time of the endorsement each of the endorsees had notice of the contract alleged to have formed the consideration of the notes. All these pleas were separately demurred to, special grounds being assigned to this effect; that neither of the pleas stated facts constituting any defence; that the consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, and neither of the pleas alleged a breach of the promise; that neither of the pleas averred that the alleged proposed contract between the two companies in the pleas stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder; that if cigars were manufactured in Key West, under the said contract between the said two companies in the said pleas stated, the

defendant and his intestate derived the same benefit and received the same consideration for the said notes, whether said contract was legal or illegal.

The demurrers were severally sustained, the case went to judgment in favor of plaintiff, and was taken on error to the Supreme Court of Florida. The errrors assigned there, so far as these pleas were concerned, were simply that the trial court erred in sustaining the demurrer in each instance. The Supreme Court affirmed the judgment, whereupon a writ of error from this court was allowed by the Chief Justice of that court, who certified, in substance, that the judgment denied "a title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America."

Six errors were assigned in this court, namely, that the State court erred in holding that the demurrer to the first plea of March 24, 1900, was properly sustained, and that the plea constituted no defence under section 3397 of the Revised Statutes; and as to the second plea and section 3393, Revised Statutes; and as to the third plea and section 3390, Revised Statutes; and in so holding as to the fourth plea, filed February 2, 1903, and section 3397, Revised Statutes; and as to the fifth plea of that date, and section 3393, Revised Statutes; and as to the sixth plea of that date, and section 3390, Revised Statutes.

The case was submitted on motions to dismiss or affirm.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The only ground on which our jurisdiction can be maintained is that defendant specially set up or claimed some title, right, privilege or immunity under a statute of the United States, which was denied by the State court. The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Johnson* v. *Risk*, 137 U. S. 300. And we are not inclined to hold that if in the view of the State court the promise of Kelly to manufacture cigars at Key West was the consideration of the notes and had been performed, and the makers could not defend on the ground that it was contemplated between Kelly and Rosen that the cigars should be removed without compliance with the revenue laws, a Federal question was decided in sustaining the demurrers to the pleas.

But, apart from that, no title, right, privilege or immunity under a statute of the United States, within the intent and meaning of section 709 of

the Revised Statutes, was specially set up or claimed by defendant and decided against.

Sections 3390, 3393 and 3397 of the Revised Statutes are regulations to secure the collection of the taxes imposed by chapter 7, Tit. 35, and defendant could derive no personal right under those sections to enforce the repudiation of his notes, even although, on grounds of public policy, they were illegal and void.

In *Walworth* v. *Kneeland*, 15 How. 348, it was held, as correctly stated in the headnotes:

"Where a case was decided in a State court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the twenty-fifth section of the judiciary act.

"The State court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

"But even if the State court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case."

And Mr. Chief Justice Taney said: "But if it had been otherwise, and the State court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the State court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength." p. 353.

The certificate on the allowance of the writ of error could not in itself confer jurisdiction on this court, *Fullerton* v. *Texas*, 196 U. S. 192, 194; and the result is that the writ of error must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.